SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 51

WILLIAM MILLER, ADMINISTRATOR OF THE ESTATES OF MARCUS ANDLAUER AND ELLANORE ANDLAUER, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a-d] [Caption omitted]

[fol. e] Citation in usual form, showing service on Watson, Ess, Groner, Barnett & Whittaker, filed April 11, 1932, omitted in printing.

[fol. 1] [Caption omitted]

IN CIRCUIT COURT OF JACKSON COUNTY

PETITION FOR DAMAGES—Filed Dec. 11, 1929

Plaintiff states that he is the duly appointed and acting Executor and personal representative of the estates of the deceased, Marcus Andlauer and Ella Andlauer, having been duly appointed as such by the proper court of Wyandotte County, Kansas, and having qualified as such.

Plaintiff further states that the deceased persons were husband and wife and left surviving them the following named children: Clem Andlauer, Mary Jane Andlauer and Elanore Andlauer.

Plaintiff further states that the defendant is a corporation organized according to law and that at all times herein mentioned it was engaged as a common carrier of freight and passengers in operating a steam railroad in an eastwardly and westwardly direction through the state of Kansas and through other states of the United States; that at all times herein mentioned the said defendant was engaged in the operation of a line of railway in an eastwardly and westwardly direction between Topeka, Kansas, and St. Marys, Kansas; that at all times herein mentioned there was located to the east of the town or city of St. Marys, Kansas, a college or institution of learning, which, during the school or college year, was attended by more than one thousand (1000) students and that there were a number of professors, attendants and others who were inmates of and attended the said institution. The said college was located less than one-fourth of a mile east of the city limits of said city of St. Marys, Kansas; that on the south side of the said line of railway being operated in said eastwardly and west-
[fol. 2] wardly direction there was an open, public highway,

used by the public travel throughout its entire length and width and that there was at all times herein mentioned a public road, which intersected the said highway and crossed the said railroad track and extended in a northerly and southerly direction; that at all times the said public road so intersecting the said east and westbound highway was used by the parents, relatives and friends of the persons connected with the said college and by the general public for the purpose of crossing the said railroad track in the vicinity of the said college grounds and that the said road so extending north and south and across the said railroad track was, to the knowledge of the said defendant, much used by the general public and by the parents and relatives of the persons attending the said college on Sundays during the college year; that within two years from the date of the filing of this petition, to-wit: on the 11th day of December, 1927, the deceased persons, Marcus Andlauer and Ella Andlauer, were husband and wife, and were riding in an automobile going in a westerly direction on the said public road and highway to the south of the said railroad track and that when the said automobile in which the said deceased persons were riding reached the intersection aforementioned, the said automobile turned to the north, for the purpose of crossing said railroad track and before it had fully crossed the said railroad track, the said automobile was struck and injured by a west-bound train operated by the defendant, and the said Marcus Andlauer and said Ella Andlauer were so injured as a direct result thereof that they died within two years from the date of the filing of this petition and this because of the negligence of the defendant; that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said thickly populated and traveled vicinity and over the said intersecting north-bound public road at a high, dangerous and excessive rate of speed; that the said defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care, could have known, and had notice and knowledge, that the said automobile in which the said deceased persons were riding and the said deceased persons were approaching and in a position of peril while turning towards and driving towards

and driving on the said track, in time, by the exercise of ordinary care, in the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased persons, either by giving warning of the [fol. 3] approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant, negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing; that as a result of all of the said acts and other acts of negligence, the said Marcus Andlauer and Ella Andlauer were so injured that they thereafter died and that the estate and the surviving children of the said deceased have thereby been damaged in the sum of Ten Thousand ($10,000.00) Dollars for the death of Marcus Andlauer and Ten Thousand ($10,000.00) Dollars for the death of said Ella Andlauer; that Sections 60-3203 and 60-3204, Revised Statutes of Kansas, Annotated 1923, at all times herein mentioned were in force and effect and are as follows:

"§60-3203. Action for Death by Wrongful Act; Limitation; Damages.—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

§60-3204. When Action May be Brought by Widow or Next of Kin.—That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state, or territory, or

when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

[fol. 4] Wherefore said plaintiff prays the court for a judgment against the said defendant for the sum of Twenty Thousand ($20,000.00) Dollars and costs of suit.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

PETITION FOR REMOVAL—Filed Jan. 9, 1930.

To the honorable, the judges of the Circuit Court within and for the County of Jackson and State of Missouri:

Your petitioner, Union Pacific Railroad Company, most respectfully shows that it is the defendant in the above entitled action; that the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00); that said suit is of a civil nature and is an action brought by the plaintiff against your petitioner.

Your petitioner further avers that in the above-entitled suit there is a controversy which is wholly between citizens of different states, to-wit, a controversy between your petitioner, Union Pacific Railroad Company, which your petitioner avers was at the time of the commencement of this suit, ever since has been, and still is, a citizen and resident of the State of Utah, and is a corporation organized and existing under and by virtue of the laws of the State of Utah, and the said William Miller, Executor, etc., who your petitioner avers was at the time of the commencement of this suit, ever since has been, and still is, a citizen and resident of the State of Kansas, and that your petitioner was not, at the time of the commencement of this action, nor since has been, and is not now a resident or citizen of the State of Missouri or Kansas.

Your petitioner offers herewith a bond with good and sufficient surety for its entering in said District Court of

the United States, within thirty days from the date of filing of this petition, a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court, if said District Court should hold that this suit was wrongfully or improperly removed thereto, and it prays this court to proceed no further herein, except to make an order for removal, and to accept said surety and bond, and to cause the record herein to be removed to said [fol. 5] District Court of the United States within and for the Western Division of the Western District of Missouri.

Union Pacific Railroad Company, by Watson, Gage & Ess, by I. N. Watson, Its Attorneys.

Duly sworn to by I. N. Watson. Jurat omitted in printing.

[File endorsement omitted.]

Bond on removal for $500.00, approved and filed Jan. 9, 1930, omitted in printing.

[fol. 6] In Circuit Court of Jackson County

Notice of Filing Petition and Bond for Removal—Filed Jan. 9, 1930

To the above-named plaintiff or Kelly, Buchholz & O'Donnell, his attorneys of record:

Take notice: You are hereby notified that the above-named defendant will on the 10th day of January, 1930, file in the Circuit Court of Jackson County, Missouri, at Kansas City, its petition and bond for removal of the above cause to the United States District Court for the Western Division of the Western District of Missouri; that the same will be presented to the Judge of the Assignment Division of said Circuit Court at nine-thirty A. M. on the [fol. 7] 10th day of January, 1930, for his orders granting the removal of said cause to said United States District Court; and you will govern yourself accordingly.

Union Pacific Railroad Company, by Watson, Gage & Ess, I. N. Watson, Attorneys for Defendant.

Received copy of the above notice this 8th day of January, 1930.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER OF REMOVAL—Jan. 10, 1930

Now on this day this cause coming on for hearing upon the petition of the defendant for the removal of this cause to the District Court of the United States and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and has heretofore filed its bond for removal, which said bond is by the Court approved and petition sustained.

It is therefore ordered by the Court that this cause be and the same is hereby removed from this Court within and to the District Court of the United States, in and for the Western Division of the Western District of Missouri, at Kansas City.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

AMENDED PETITION FOR DAMAGES—Filed Feb. 28, 1931.

Count I

Plaintiff states that on the 11th day of December, 1927, Ellanore Andfauer died intestate at St. Marys, Pottawatomie County, Kansas, as a result of the wrongful acts of the defendant hereinafter set forth; that at said time the said Ellanore Andlauer was a resident of Shawnee County, Kansas, and a citizen of the State of Kansas; that at the said time the above named plaintiff was a citizen and resident of Wyandotte County, Kansas; that at said time the said deceased was the mother of three minor children, residing in the State of Kansas.

Plaintiff further states that thereafter and on the 16th day of December, 1927, he was appointed administrator of

the estate of said Ellanore Andlauer, by the Probate Court of Shawnee County, Kansas, and that at the same time the said plaintiff was appointed guardian of the minor children of the said deceased, and that during all of the time since said 16th day of December, 1927, the said plaintiff has been the duly appointed and acting guardian of the said minor children and that said minor children have had their home with the plaintiff and he has been acting as the parent and guardian.

Plaintiff further states that thereafter he interviewed counsel for the plaintiff herein and requested that they institute this suit against the said defendant, to recover the sum of Ten Thousand ($10,000.00) Dollars from the said defendant because of its wrongful acts in causing the death of the said deceased, as hereinafter set forth; that through mistake the above named plaintiff was described as Executor of the estate of the said deceased and as having been appointed as such by the Probate Court of Wyandotte County, Kansas; that on the 25th day of February, 1929, the said plaintiff, as administrator of the estate of said deceased, was discharged as administrator and the said administration closed.

Plaintiff further states that on the 25th day of February, 1931, on his attention being called to the said mistake, the said plaintiff appeared in the Probate Court of Shawnee County, Kansas, and filed his petition in the said Probate Court directing its attention to the fact that the said estate was not fully administered and that an administrator should be appointed by the court to collect said sum from the said defendant and look after any and all money due the said estate; that thereupon the said Probate Court of Shawnee County, Kansas, made and entered its order, [fol. 9] which said order is in words and figures, as follows:

"In the Probate Court of Shawnee County, Kansas

No. 9862

In the Matter of the Estate of Ellanore Andlauer, Deceased

Order

Now on this 25th day of February, 1931, comes on for hearing the application of William H. Miller for an order reopening the above estate.

Thereupon the Court Finds that Ellanore Andlauer died on the 11th day of December, 1927, intestate and that her estate was admitted to probate and administered and the estate closed on the 25th day of February, 1929; that it now appears that there is due the sum of ten thousand dollars to the estate from the Union Pacific Railway Company on account of the wrongful death of Ellanore Andlauer.

The Court Further Finds that William H. Miller is a resident of the State of Kansas and a competent, worthy and suitable person to assume the duties of administrator of said estate.

The Court Further Finds that the application to reopen said estate should be granted.

It It Therefore by the Court Ordered and Decreed that the above estate be and the same is hereby reopened.

It Is Further Ordered That William H. Miller be and he is hereby appointed administrator herein and that he execute his administrator's bond in the principal sum of $50.00 with conditions and sureties according to law.

J. F. Kaster, Probate Judge." (Seal.)

And plaintiff says that he is now the duly appointed, qualified and acting administrator of said estate.

That on the 27th day of February, 1931, the said defendant served upon the plaintiff a copy of its Answer and Plea in Abatement to the Amended Petition heretofore herein filed.

Plaintiff further states that the deceased Ellanore Andlauer left surviving her the following named children: Clem Andlauer, Mary Jane Andlauer and Elanore Andlauer.

Plaintiff further states that the defendant is a corporation organized according to law and that at all times herein mentioned it was engaged as a common carrier of freight and passengers in operating a steam railroad in an east- [fol. 10] wardly and westwardly direction through the state of Kansas and through other states of the United States; that at all times herein mentioned the said defendant was engaged in the operation of a line of railway in an easterwardly and westerwardly direction between Topeka, Kansas, and St. Marys, Kansas; that at all times herein mentioned there was located to the east of the town

or city of St. Marys, Kansas, a college or institution of learning, which, during the school or college year, was attended by more than one thousand (1,000) students and that there were a number of professors, attendants and others who were inmates of and attended the said institution. The said college was located less than one-fourth of a mile east of the city limits of said city of St. Marys, Kansas; that on the south side of the said line of railway being operated in said eastwardly and westwardly direction there was an open, public highway, used by the public travel throughout its entire length and width and that there was at all times herein mentioned a public road, which intersected the said highway and crossed the said railroad track and extended in a northerly and southerly direction; that at all times the said public road so intersecting the said east and west-bound highway was used by the parents, relatives and friends of the persons connected with the said college and by the general public for the purpose of crossing the said railroad track in the vicinity of the said college grounds and that the said road so extending north and south and across the said railroad track was, to the knowledge of the said defendant, much used by the general public and by the parents and relatives of the persons attending the said college on Sundays during the college year; that within two years from the date of the instituting of this action, to-wit: on the 11th day of December, 1927, the deceased was riding in an automobile going in a westerly direction on the said public road and highway to the south of the said railroad track and that when the said automobile in which the said deceased was riding reached the intersection aforementioned, the said automobile turned to the north, for the purpose of crossing said railroad track and before it had fully crossed the said railroad track, the said automobile was struck and injured by a west-bound train operated by the defendant, and the said Ellanore Andlauer was so injured as a direct result thereof that she died within two years from the date of the institution of this action and this because of the negligence of the defendant; that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said thickly populated and traveled vicinity and over the said intersecting north-bound public road at a high, dangerous and excessive rate

[fol. 11] of speed; that the said defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care, could have known, and had notice and knowledge, that the said automobile in which the said deceased was riding and the said deceased was approaching and in a position of peril while turning towards and moving towards and moving on the said track, in time, by the exercise of ordinary care, in the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased, either by giving warning of the approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant, negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that the defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing; that as a result of all of the said acts and other acts of negligence, the said Ellanore Andlauer was so injured that she thereafter died and that the estate and the surviving children of the said deceased have thereby been damaged in the sum of Ten Thousand ($10,000.00) Dollars; that Sections 60-3203 and 60-3204, Revised Statutes of Kansas, Annotated 1923, at all times herein mentioned were in force and effect, and are as follows:

"§60-3203. Action for Death by Wrongful Act; Limitation; Damages.—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distrib-

uted in the same manner as personal property of the deceased.

§60-3204. When Action May be Brought by Widow or Next of Kin.—That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal [fol. 12] representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

Wherefore said plaintiff prays the court for a judgment against the said defendant for the sum of Ten Thousand ($10,000.00) Dollars and costs of suit.

Count II

And for a second cause of action plaintiff states that on the 11th day of December, 1927, Marcus Andlauer died intestate at St. Marys, Pottawatomie County, Kansas, as a result of the wrongful acts of the defendant hereinafter set forth; that at said time the said Marcus Andlauer was a resident of Shawnee County, Kansas, and a citizen of the State of Kansas; that at the said time the above named plaintiff was a citizen and resident of Wyandotte County, Kansas; that at said time the said deceased was the father of three minor children, residing in the State of Kansas.

Plaintiff further states that thereafter and on the 16th day of December, 1927, he was appointed administrator of the estate of said Marcus Andlauer, by the Probate Court of Shawnee County, Kansas, and that at the same time the said plaintiff was appointed guardian of the minor children of the said deceased, and that during all of the time since said 16th day of December, 1927, the said plaintiff has been the duly appointed and acting guardian of the said minor children and that said minor children have had their home with the plaintiff and he has been acting as the parent and guardian.

Plaintiff further states that thereafter he interviewed counsel for the plaintiff herein and requested that they institute this suit against the said defendant, to recover the

sum of Ten Thousand ($10,000.00) Dollars from the said defendant because of its wrongful acts in causing the death of the said deceased, as hereinafter set forth; that through mistake the above named plaintiff was described as Executor of the estate of the said deceased and as having been appointed as such by the Probate Court of Wyandotte County, Kansas; that on the 25th day of February, 1929, the said plaintiff, as administrator of the estate of said deceased, was discharged as administrator and the said administration closed.

Plaintiff further states that on the 25th day of February, 1931, on his attention being called to the said mistake, the said plaintiff appeared in the Probate Court of Shawnee County, Kansas, and filed his petition in the said Probate Court directing its attention to the fact that the said estate was not fully administered and that an ad-
[fol. 13] ministrator should be appointed by the court to collect said sum from the said defendant and look after any and all money due the said estate; that thereupon the said Probate Court of Shawnee County, Kansas, made and entered its order, which said order is in words and figures, as follows:

"IN THE PROBATE COURT OF SHAWNEE COUNTY, KANSAS

No. 9868

In the Matter of the Estate of MARK A. ANDLAUER, Deceased

ORDER

Now on this 25th day of February, 1931, comes on for hearing the application of William H. Miller for an order reopening the above estate.

Thereupon the Court Finds that Mark A. Andlauer died on the 11th day of December, 1927, intestate and that his estate was admitted to probate and administered and the estate closed on the 25th day of February, 1929; that it now appears that there is due the sum of Ten Thousand dollars to the estate from the Union Pacific Railway Company on account of the wrongful death of Mark A. Andlauer.

The Court Further Finds that William H. Miller is a resident of the State of Kansas and a competent, worthy and suitable person to assume the duties of administrator of said estate.

The Court Further Finds that the application to reopen said estate should be granted.

It Is Therefore by the Court Ordered and Decreed that the above estate be and the same is hereby reopened.

It Is Further Ordered that William H. Miller be and he is hereby appointed administrator herein and that he execute his administrator's bond in the principal sum of $50.00 with conditions and sureties according to law.

J. F. Kaster, Probate Judge." (Seal.)

And plaintiff says that he is now the duly appointed, qualified and acting administrator of said estate.

That on the 27th day of February, 1931, the said defendant served upon the plaintiff a copy of its Answer and Plea in Abatement to the Amended Petition heretofore herein filed.

Plaintiff further states that the deceased Marcus Andlauer left surviving him the following named children: Clem Andlauer, Mary Jane Andlauer and Elanore Andlauer.

Plaintiff further states that the defendant is a corporation organized according to law and that at all times herein [fol. 14] mentioned it was engaged as a common carrier of freight and passengers in operating a steam railroad in an eastwardly and westwardly direction through the state of Kansas and through other states of the United States; that at all times herein mentioned the said defendant was engaged in the operation of a line of railway in an eastwardly and westwardly direction between Topeka, Kansas, and St. Marys, Kansas; that at all times herein mentioned there was located to the east of the town or city of St. Marys, Kansas, a college or institution of learning, which, during the sc. ol or college year, was attended by more than one thousand (1,000) students and that there were a number of professors, attendants and others who were inmates of and attended the said institution. The said college was located less than one-fourth of a mile east of the city limits of said city of St. Marys, Kansas; that on the south side of the said line of railway being operated in

said eastwardly and westwardly direction there was an open, public highway, used by the public travel throughout its entire length and width and that there was at all times herein mentioned a public road, which intersected the said highway and crossed the said railroad track and extended in a northerly and southerly direction; that at all times the said public road so intersecting the said east and west-bound highway was used by the parents, relatives and friends of the persons connected with the said college and by the general public for the purpose of crossing the said railroad track in the vicinity of the said college grounds and that the said road so extending north and south and across the said railroad track was, to the knowledge of the said defendant, much used by the general public and by the parents and relatives of the persons attending the said college on Sundays during the college year; that within two years from the date of the filing of this petition, to-wit: on the 11th day of December, 1927, the deceased was riding in an automobile going in a westerly direction on the said public road and highway to the south of the said railroad track and that when the said automobile in which the said deceased was riding reached the intersection aforementioned, the said automobile turned to the north, for the purpose of crossing said railroad track and before it had fully crossed the said railroad track, the said automobile was struck and injured by a west-bound train operated by the defendant, and the said Marcus Andlauer was so injured as a direct result thereof that he died within two years from the date of the instituting of this action and this because of the negligence of the defendant; that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said [fol. 15] thickly populated and traveled vicinity and over the said intersecting north-bound public road at a high, dangerous and excessive rate of speed; that the said defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care, could have known, and had notice and knowledge, that the said automobile in which the said deceased was riding and the said deceased was approaching and in a position of peril while turning towards and moving towards and moving on the said track, in time, by the exercise of ordinary care, in

the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased, either by giving warning of the approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant, negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing; that as a result of all of the said acts and other acts of negligence, the said Marcus Andlauer was so injured that he thereafter died and that the estate and the surviving children of the said deceased have thereby been damaged in the sum of Ten Thousand ($10,000.00) Dollars; that Section 60-3203 and 60-3204, Revised Statutes of Kansas, Annotated 1923, at all times herein mentioned were in force and effect, and are as follows:

"§60-3203. Action for Death by Wrongful Act; Limitation; Damages.—When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

[fol. 16] §60-3204. When Action May be Brought by Widow or Next of Kin.—That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or

where there is no widow, by the next of kin of such deceased."

Wherefore said plaintiff prays the court for a judgment against the said defendant for the sum of Ten Thousand ($10,000.00) Dollars and costs of suit.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PLEA IN ABATEMENT AND ANSWER TO PLAINTIFF'S AMENDED MOTION—Filed Dec. 23, 1931

To Count One

I

Defendant by way of plea in abatement to Count One of plaintiff's amended petition states that the plaintiff, William Miller, at the time of the institution of this suit was not the executor of the estate of Ella Andlauer, but was appointed executor of the estate of the said Ella Andlauer after the institution of this suit, and at the time this suit was filed the said William Miller had no right to bring said suit and was not interested in the subject matter thereof, and the alleged cause of action set out in Count One of plaintiff's amended petition had not accrued to the said William Miller at the time this suit was instituted and by reason of the above-stated facts, this suit was prematurely brought.

Wherefore, defendant prays that the action on Count One be abated and dismissed.

[fol. 17] II

Defendant states that the cause of action, if any, asserted in Count One of plaintiff's amended petition is barred by the Statute of Limitations of the State of Kansas, namely, Section 60-3203 R. S. Kansas 1923, because, this action was not instituted within two years from the alleged date of the accrual thereof; that the plaintiff could

have had no cause of action until he was appointed executor of the estate of Ella Andlauer, deceased, and that he was not appointed until after this suit had been instituted and was not so appointed until more than two years after the date of the accrual of the alleged cause of action contained in Count One of the petition.

III

Defendant denies that Ella Andlauer was riding on a public highway or upon a highway used by the public, or that she was in any manner struck or injured by riding upon or using or otherwise being upon the public highway, and defendant denies that Ella Andlauer was injured or came to her death by reason of any negligence of the defendant, and denies that defendant operated its train at either a high or dangerous or excessive rate of speed, and denies that it failed to sound a warning of the approach of its train, and denies that defendant knew, and denies that by the exercise of ordinary care it could have known, and denies that it had notice or knowledge, that the automobile in which Ella Andlauer was riding was approaching or in a position of peril in time by the exercise of ordinary care, by use of the means at the command of the defendant to have avoided collision or injury to Ella Andlauer, and denies that defendant knew, or by the exercise of ordinary care could have known that the said Ella Andlauer was in a position of peril or coming into a position of peril in time to have given a warning of the approach of defendant's train or to slacken the speed thereof, or to stop the train in time to have avoided collision or injury. Defendant denies that there was any custom for the defendant to slow down its trains while passing the college referred to in the petition, or while entering the City of St. Marys, and denies that the said Ella Andlauer was injured by reason of the failure to observe any custom to slow down and denies that there was a failure to observe any custom to slow down, and denies that either the said Ella Andlauer or the drive of said automobile relied upon any custom to slow down at the said place. Defendant denies that it negligently or otherwise failed to ring a bell, and [fol. 18] denies that it negligently or otherwise failed to

sound a whistle, and denies that it failed to give such warnings when with eighty (80) rods of the place where Ella Andlauer was struck, and denies that Ella Andlauer was injured or come to her death by reason of any failure to sound a bell or whistle.

IV

Defendant states that Ella Andlauer was guilty of negligence which directly contributed to her injuries and to her death in this: She was riding in an automobile in the daytime and said automobile was being then driven by her husband; said automobile was traveling parallel to the railroad track upon which defendant's train was running; that said railroad track was a straight right-of-way and the said Ella Andlauer knew that her husband intended to drive said automobile across the said railroad track, and the said Ella Andlauer, by the exercise of ordinary care, could have seen the approach of defendant's train for more than one mile before said train reached said crossing. The said Ella Andlauer, while riding in said automobile, saw, or by the exercise of ordinary care could and would have seen, said railroad train then operated by defendant approaching upon said track, in time to have caused said vehicle in which she was riding to have been stopped, and by the exercise of ordinary care she could thereby have avoided a collision with defendant's train; that the said Ella Andlauer either saw said train, or failed to look for said train before going upon the track in front of the approaching train in time so that she could have notified her husband, who was driving said automobile, of the approach of said train before he had driven said automobile upon the track in front of said train and in time to have avoided collision, and by the exercise of ordinary care the said Ella Andlauer could have avoided such collision.

Neither the said Ella Andlauer nor her husband, Marcus Andlauer, stopped said automobile in which they were riding before going upon the track in front of said approaching train, although due and proper warning by whistle and bell were given of the approach of said train, and the said Ella Andlauer heard, or by the exercise of ordinary care she could have heard said warning signals, and she knew, or by the exercise of ordinary care could and would have

known of the approach of said train. It was the duty of the said Ella Andlauer to exercise due care for her own safety against the possibility of collision with said train, and the railroad right-of-way was within her plain sight and it was obvious that it was a railroad right-of-way, and [fol. 19] the said Ella Andlauer knew, or by the exercise of ordinary care could and should have known that her husband intended to drive the automobile in which she was riding upon a railroad track where the approach of trains should be expected, and she did nothing to prevent said car from being driven upon said railroad track in front of the approaching train. The above-stated negligence of the said Ella Andlauer directly contributed to her injuries and to her death.

Wherefore, having fully answered the First Count of the amended petition, defendant prays to be discharged with its costs.

To Count Two

I

Defendant by way of plea in abatement to Count Two of plaintiff's amended petition states that the plaintiff, William Miller, at the time of the institution of this suit was not the executor of the estate of Marcus Andlauer, but was appointed executor of the estate of the said Marcus Andlauer after the institution of this suit, and at the time this suit was filed the said William Miller had no right to bring said suit and was not interested in the subject matter thereof, and the alleged cause of action set out in Count Two of plaintiff's amended petition had not accrued to the said William Miller at the time this suit was instituted, and by reason of the above-stated facts, this suit was prematurely brought.

Wherefore, defendant prays that this action on Count Two be abated and dismissed.

II

Defendant states that the cause of action, if any, asserted in Count Two of plaintiff's amended petition is barred by the Statute of Limitations of the State of Kansas, namely Section 60-3203 R. S. Kansas 1923, because

this action was not instituted within two years from the alleged date of the accrual thereof; that the plaintiff could have had no cause of action until he was appointed executor of the estate of Marcus Andlauer, deceased, and that he was not appointed until after this suit had been instituted and more than two years after the date of the accrual of the alleged cause of action contained in Count Two of the petition.

III

Defendant denies that Marcus Andlauer was riding on a public highway or upon a highway used by the public, or [fol. 20] that he was in any manner struck or injured by riding upon or using or otherwise being upon the public highway, and defendant denies that Marcus Andlauer was injured or that he came to his death by reason of any negligence of the defendant, and denies that defendant operated its train at either a high or dangerous or excessive rate of speed, and denies that it failed to sound a warning of the approach of its train, and denies that defendant knew, and denies that by the exercise of ordinary care it could have known, and denies that it had notice and knowledge that the automobile, in which Marcus Andlauer was riding, was approaching, or in a position of peril in time by the exercise of ordinary care, by the use of the means at the command of the defendant to have avoided collision or injury to Marcus Andlauer, and denies that defendant knew, or that by the exercise of ordinary care it could have known that the said Marcus Andlauer was in a position of peril, or coming into a position of peril, in time to have given a warning of the approach of defendant's train or to slacken the speed thereof, or to stop the train in time to have avoided collision or injury. Defendant denies that there was a custom for the defendant to slow down its trains while passing the college referred to in the petition, or while entering the City of St. Marys, and denies that the said Marcus Andlauer either knew of or relied upon any such custom, and denies that the said Marcus Andlauer was injured by reason of the failure to observe any custom to slow down, and denies that there was a failure to observe any custom to slow down. Defendant denies that it negligently or otherwise failed to ring a bell and denies that it negligently or

otherwise failed to sound a whistle, and denies that it failed to give such warnings when within eighty (80) rods of the place where Marcus Andlauer was struck, and denies that Marcus Andlauer was injured, or came to his death by reason of any failure to sound a bell or whistle.

IV

Defendant states that Marcus Andlauer was guilty of negligence which directly contributed to his injuries, and to his death in this: He was riding in an automobile in the daytime, which said automobile was being driven by himself; said automobile was traveling parallel to the railroad track upon which defendant's train was running; that said railroad track was a straight right-of-way and the said Marcus Andlauer intended to drive said automobile across the said railroad track, and the said Marcus Andlauer, by the exercise of ordinary care could and would have seen the approach of defendant's train for more than one mile [fol. 21] before said train reached said crossing. The said Marcus Andlauer, while driving said automobile, saw, or by the exercise of ordinary care, could and would have seen said railroad train then operated by defendant approaching upon said track in time to have caused said vehicle which he was driving to stop, and by the exercise of ordinary care, he could thereby have avoided a collision with defendant's train; that the said Marcus Andlauer either saw said train, or failed to look for said train before going upon the track in front of the approaching train, in time so that he could have stopped said automobile and avoided said collision, and by the exercise of ordinary care the said Marcus Andlauer could have avoided such collision.

The said Marcus Andlauer did not stop said automobile which he was driving before going upon the track in front of the approaching train, although due and proper warning by whistle and bell were given of the approach of said train, and the said Marcus Andlauer heard, or by the exercise of ordinary care he could have heard, said warning signals, and he knew, or by the exercise of ordinary care could and would have known of the approach of said train. It was the duty of the said Marcus Andlauer to exercise due care for his own safety against the possibility of collision with said train, and the railroad right-of-way

was within his plain sight, and it was obvious that it was a railroad right-of-way, and the said Marcus Andlauer intentionally drove his said automobile upon a railroad track where the approach of trains should be expected, and he did nothing to prevent said car from going upon said railroad track in front of the approaching train. The above-stated negligence of the said Marcus Andlauer directly contributed to his injuries and his death.

Wherefore, having fully answered the Second Count of the amended petition, defendant prays to be discharged with its costs.

T. M. Lillard, Watson, Gage, Ess, Groner & Barnett, by Paul Barnett, Attorneys for Defendant.

[File endorsement omitted.]

In United States District Court

Reply—Filed Feb. 9, 1932

Reply to Count I

I

Now comes plaintiff and for reply to the defendant's Plea in Abatement and Answer to Count I denies each [fol. 22] and every allegation in Defendant's Plea in Abatement and in Defendant's Answer to Count I contained.

Reply to Count II

II

Now comes plaintiff and for reply to the defendant's Plea in Abatement and Answer to Count II denies each and every allegation in Defendant's Plea in Abatement and Answer to Count II contained.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court

Record Entry—Jury Empanelled; Trial—Mch. 9, 1932

This day this cause coming on regularly to be heard, the parties appear by their attorneys of record and an-

nounce ready for trial; defendant's demurrer is heard by the court and overruled; a jury is ordered and comes as follows: Roy Warnick, Carl D. Brooks, A. S. Harrison, T. C. Hulse, James E. Winchell, Charles T. Brown, Ira Cass, W. O. Clark, L. W. Garrison, E. H. Galladay, L. E. Holding and K. V. Johnson who are duly chosen and sworn to try this cause. Opening statements are made and plaintiff introduces testimony, and further proceedings are postponed until Thursday, March 10, 1932, at ten o'clock A. M.

RECORD ENTRY—TRIAL—Mch. 10, 1932

Now the parties herein appear by their attorneys, the jury being in court the trial is resumed and plaintiff introduces testimony and rests. Defendant's counsel files request for an instructed verdict on both counts of the petition which is submitted to the court, heard and taken under advisement until tomorrow morning. Further hearing is postponed until Friday March 11 at ten o'clock A. M.

IN UNITED STATES DISTRICT COURT

JUDGMENT—March 11, 1932

Come now again the parties hereto by their attorneys and the jury being in court the trial of this cause is resumed, the court renders his opinion on motion for directed verdict. The defendant's motion in the alternative is sus-
[fol. 23] tained and the cause of action respectively set forth in counts one and two of the petition are dismissed on the merits with prejudice and with costs to the defendant, to be taxed by the clerk and the plaintiff is allowed an exception to the ruling of the court. The jury is excused from further consideration of this cause. The plaintiff to pay the costs herein.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 11, 1932

To whom it may concern and to the above-named defendant or Watson, Ess, Groner, Barnett & Whittaker, its attorneys of record:

You will please take notice that plaintiff, William Miller, Administrator of the estates of Marcus Andlauer, deceased, and Ellanore Andlauer, deceased, feeling aggrieved by the judgment rendered and entered in the above entitled cause, on the 11th day of March, 1932, does appeal from said judgment to the United States Circuit Court of Appeals for the 8th Circuit, a copy of plaintiff's application for appeal is hereto attached.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

Service of a true copy of within and foregoing notice of appeal and also copy of application for appeal acknowledged and accepted at Kansas City, Missouri, this 11th day of April, 1932.

Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed April 11, 1932

The above named plaintiff, William Miller, Administrator of the estates of Marcus Andlauer, deceased, and Ellanore Andlauer, deceased, feeling aggrieved by the judgments, orders, rulings and decisions of the court in the above entitled cause, made and entered on the 11th day of March, 1932, does hereby appeal from said judgments, orders and rulings and decisions, dismissing plaintiff's case, and each count thereof, upon the merits, with prejudice, to the United States Circuit Court of Appeals for the 8th Circuit, for the reasons set forth in the assignments of error and said plaintiff prays that his appeal be

allowed and that citation be issued, as provided by law [fol. 24] and that a transcript of the record, proceedings and documents on which said judgments were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 8th Circuit, under the rules of said court in cases made and provided.

Plaintiff presents herewith his appeal bond in the sum of Five Hundred ($500.00) Dollars, that being the amount fixed by the court as the appeal bond herein, and prays that said bond may be approved.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed April 11, 1932

Now comes William Miller, the Administrator of the estates of Marcus Andlauer and Ellanore Andlauer, deceased, plaintiff herein, and says that the judgment and order entered herein on the 11th day of March, 1932, in the above entitled cause, is erroneous and against the just rights of the said plaintiff, for the following reasons:

(1) Because the court erred in sustaining, over plaintiff's objections and exceptions, defendant's Motion to Dismiss this cause, with prejudice.

(2) Because the court erred in holding over plaintiff's objections and exceptions that as a matter of law the defendant was entitled to judgment in its favor upon the pleadings and the evidence in said cause.

(3) Because the court erred in holding that William Miller, Administrator, was not entitled to recover of and from the defendant because of its wrongful acts in causing the death of Ellanore Andlauer, deceased.

(4) Because the court erred in holding that William Miller, Administrator, was not entitled to recover of and from the defendant because of its wrongful acts in causing the death of Marcus Andlauer, deceased.

(5) Because the court erred in sustaining the defendant's Motion for a Directed Verdict.

(6) Because the court erred at the close of the evidence in rendering a judgment that the cause be dismissed with prejudice.

[fol. 25] (7) Because the court erred in permitting an examination of witnesses by the defendant on matters concerning which they were not examined by the plaintiff.

Wherefore plaintiff, because of each and all of the errors as herein specified, prays that the judgments and orders entered against him herein on the 11th day of March, 1932, be reversed at defendant's costs.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed April 11, 1932

Now on this 11th day of April, 1932, there is presented to this court the application of plaintiff, William Miller, Administrator of the estates of Marcus Andlauer, deceased, and Ellanore Andlauer, deceased, praying for the allowance of an appeal herein to the United States Circuit Court of Appeals for the 8th Circuit and it appearing to the court that there has been filed with said application for appeal an assignment of error, setting forth and apart, each error intended to be urged and it further appearing that a good and sufficient bond in the sum of Five Hundred ($500.00) Dollars, as an appeal bond, this being the amount of the appeal bond fixed by the court, it is therefore

Ordered by the court that an appeal be, and the same is, hereby allowed said plaintiff, as provided by law to the United States Circuit Court of Appeals for the 8th Circuit to review the proceedings and judgment in this case, whereby a judgment was rendered in favor of the defendant against plaintiff on the 11th day of March, 1932; that citation issue, as provided by law; that a full transcript of the proceedings be by the clerk of said court presented and filed with the clerk of the United States Circuit Court of Appeals for the 8th Circuit, and the appeal bond herein tendered is hereby approved.

It is further ordered that the plaintiff be, and he is hereby, given until on or before sixty (60) days from this date in which to file a bill of exceptions herein.

[fol. 26] Done at Kansas City, Missouri, this 11th day of April, 1932.

Merrill E. Otis, District Judge.

Bond on appeal for $500.00, approved and filed April 11, 1932, omitted in printing.

[fol. 27] In United States District Court

Notice of Filing Præcipe and Election as to Printing—Filed April 11, 1932

To Union Pacific Railroad Company, a corporation, and Watson, Ess, Groner, Barnett and Whittaker, its attorneys of record:

Please take notice that on the 11th day of April, 1932, the undersigned filed with the Clerk of this Court a præcipe for the record to be transmitted to the United States Circuit Court of Appeals, Eighth Circuit, on appeal sued out in the above cause, copy of which præcipe is herewith served on you.

You are further notified that on the 11th day of April, 1932, the undersigned filed with the Clerk of this Court an election as to printing, designating the Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, as the person under whose supervision the printing on the appeal of the above cause shall be done, a copy of which election as to printing is herewith served on you.

Dated this 11th day of April, 1932.

Kelly, Buchholz & O'Donnell, Attorneys for Appellant.

[fol. 28] Service of the within election as to printing and copy of præcipe are hereby acknowledged this 11th day of April, 1932.

Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Appellee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed April 11, 1932.

To the clerk of the above court:

You will please include in the record herein, the following portions of the record:

1st. All record entries.
2d. Transcript of the cause as removed from the Circuit Court of Jackson County, Missouri.
3d. Plaintiff's amended petition, filed February 28, 1931.
4th. Defendant's answer to said amended petition.
5th. Plaintiff's reply.
6th. Order, judgment and decree, dismissing plaintiff's case on its merits, with prejudice, and with costs to the defendant.
7th. Plaintiff's application for appeal.
8th. Plaintiff's notice of appeal with acknowledgment of service.
9th. Plaintiff's assignments of error.
10th. Bond for appeal.
11th. Order allowing appeal.
12th. Citation with service.
13th. Bill of exceptions.
14th. Election to have transcript printed by Clerk of the District Court.
15th. This præcipe.
16th. Certificate of clerk authenticating the record.

Kelly, Buchholz & O'Donnell, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed April 11, 1932

The plaintiff above named hereby elects to have the Clerk of the Court of the District Court of the United States for the Western Division of the Western District

of Missouri, at Kansas City, supervise the printing herein on appeal of this cause.

Kelly, Buchholz & O'Donnell, Attorneys for Appellant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS—Filed May 19, 1932

Now on this day for good cause shown the time in which to file the bill of exceptions herein is extended 40 days from this date.

May 19, 1932.

Albert L. Reeves, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE TRANSCRIPT—Filed May 19, 1932

Now on this day for good cause shown, the time in which to file the transcript of the record in the United States Circuit Court of Appeals is hereby enlarged 40 days from this date.

May 19, 1932.

Albert L. Reeves, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS—Filed May 27, 1932

The above entitled action came duly on for hearing before the Court, the Honorable Andrew Miller, Judge, sitting by assignment, and a jury empanelled, at Kansas

City, Missouri, on the 9th day of March, 1932, the plaintiff appearing by his attorneys, Messrs. Kelly, Buchholz & O'Donnell, of Kansas City, Missouri, and the defendant appearing by its attorneys, Messrs. Lillard, Hurd & Eidson, [fol. 30] of Topeka, Kansas, and Messrs. Watson, Ess, Groner, Barnett & Whittaker, of Kansas City, Missouri. Whereupon the following proceedings were had:

"By Mr. Whittaker: Now if the Court please, defendant objects to the introduction of any evidence in this case for the reason that the petition upon which the case is being tried wholly fails to state any cause of action or facts sufficient to constitute a cause of action, and more particularly because this action is, and upon the face of the petition it appears to be, prematurely brought.

The Court: Objection overruled.

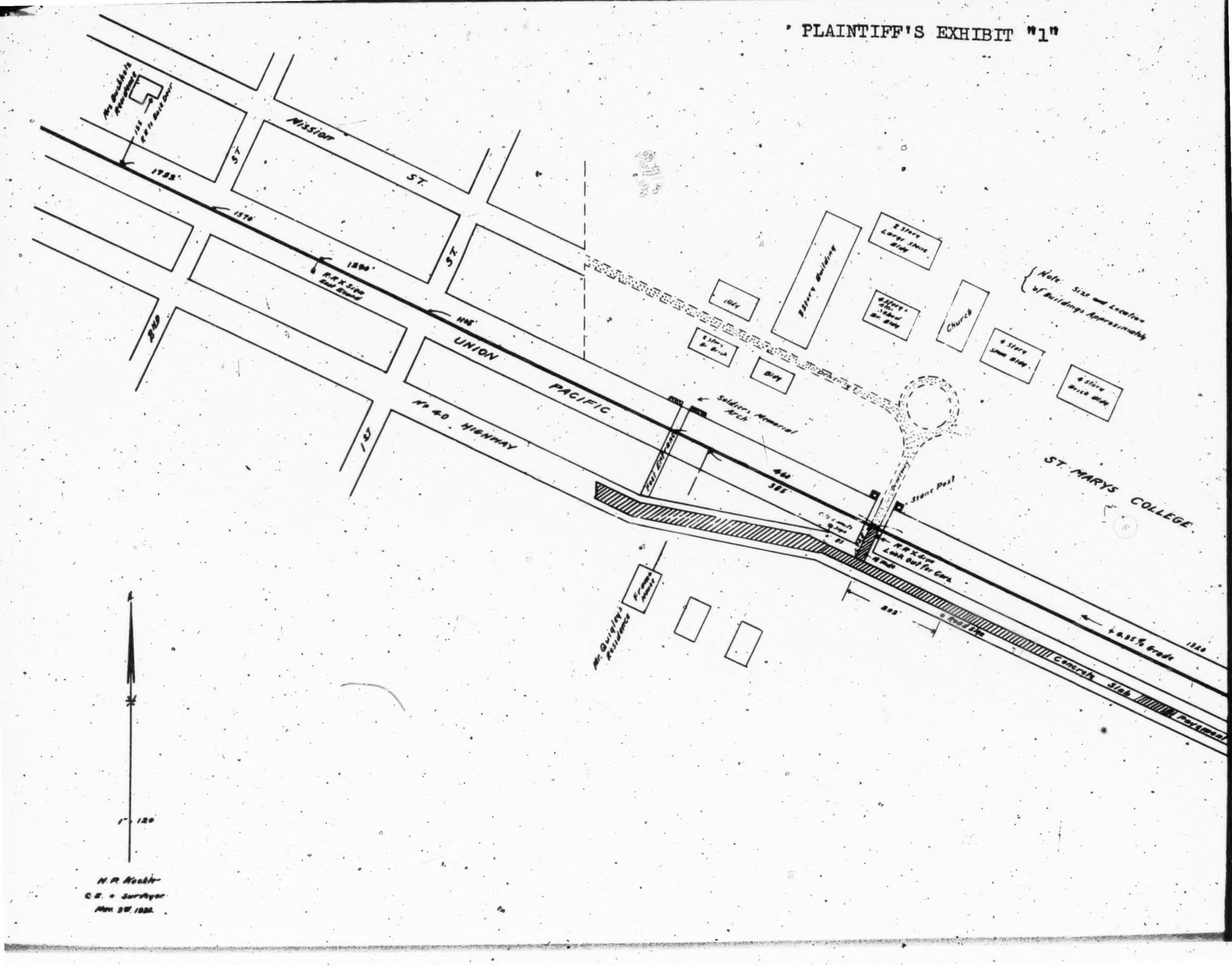
Mr. Whittaker: Exception."

Thereupon HARRY P. KOEHLER, being called as a witness, testified that he is a civil engineer and surveyor in Kansas City, Missouri, in which business he has been engaged for twenty-two years; that he made a plat of St. Marys, Kansas, showing U. S. Highway No. 40 and a part of the Union Pacific railroad tracks, showing the entrance to and street crossings in the vicinity of St. Marys College.

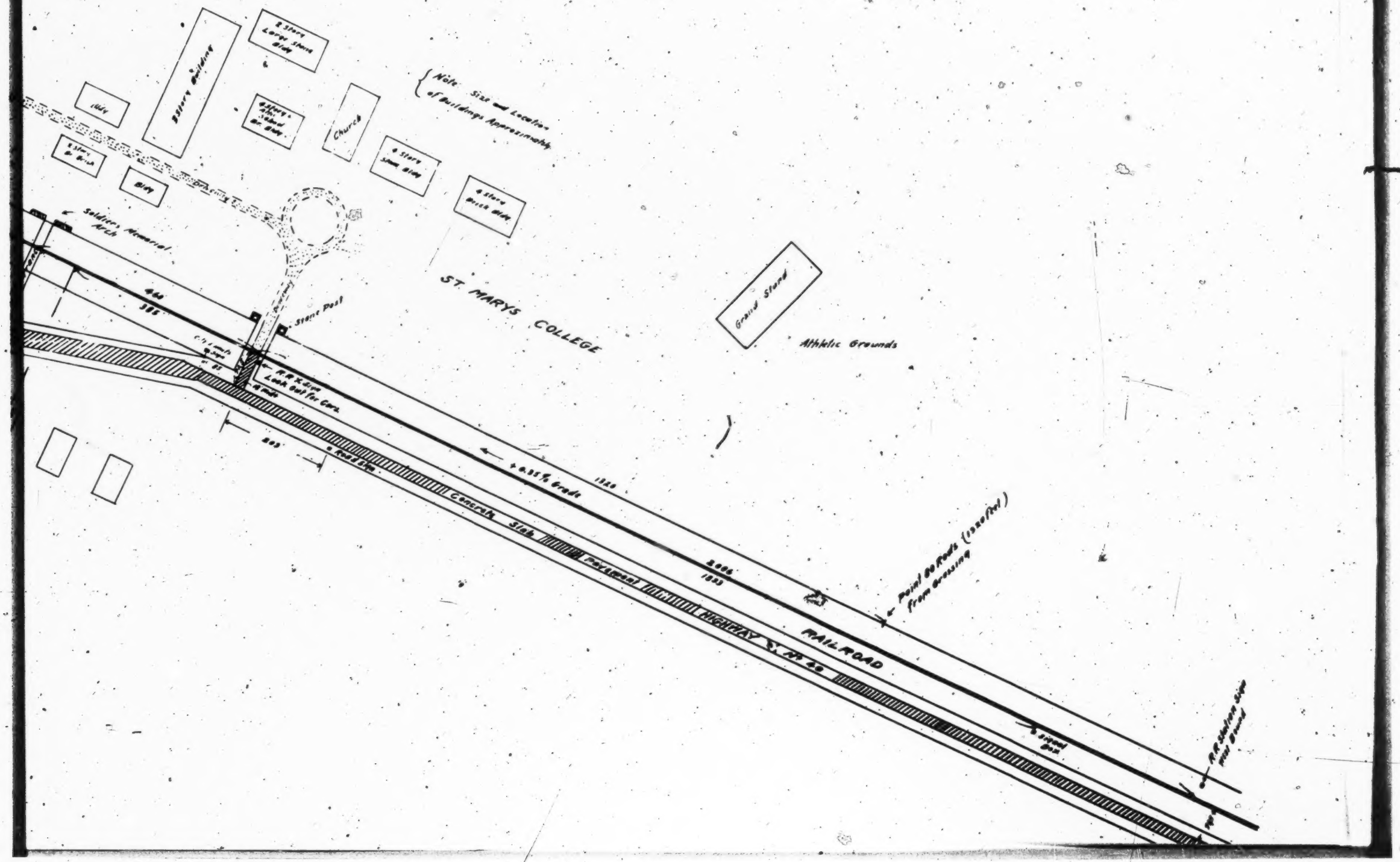
Here the plaintiff introduced and offered in evidence the plat marked "Exhibit 1," made by Mr. Kohler, which is as follows:

(Here follows exhibit, side folio 30a.)

PLAINTIFF'S EXHIBIT "1"



PLAINTIFF'S EXHIBIT "1"



[fol. 31] The witness personally made a survey on March 1, 1932, and made the plat the next day. The measurements were made with a 100-foot steel tape. The witness then indicated on the plat a roadway running northerly from U. S. 40 Highway across the railroad track and into the grounds of St. Marys College. The distance from the north edge of the slab on U. S. 40 Highway to the south rail of the railroad track is 71½ feet. The railroad track is a standard gauge, the rails being practically five feet apart. There is a driveway running through the grounds and connects into Mission Street at the point indicated on the plat. Right at the crossing 17 feet south of the rail and one foot east of the concrete slab on the roadway running into the College grounds was the post that was known as the railroad crossing sign and had on it "Look out for the cars," painted white with black letters. The witness indicated on the plat the College buildings and the church. They were not drawn to scale but their location and dimensions were estimated. The distance from the rail to the slab and other distances were by actual measurements. A whistling post was located 2006 feet to the east of the center of the driveway entering the College grounds, on the north side of the railroad track. A whistling post was located 1290 feet west of the center of the entrance to the College grounds on the south side of the railroad track. The distance from the center of the driveway to the mark opposite the Buchholz residence is 1752 feet and it is 155 feet from the north rail of the track to the back door of the Buchholz house. To the south of public Highway No. 40 there are three houses and the witness marked the third house as being Mr. Quigley's residence. A road sign was located on the south side of Highway No. 40, 203 feet east of the center of the roadway that runs north over the track and into the College grounds.

"Q. Now do you notice, have you got any sign there with reference to the city limits?

A. Yes, there is a sign indicated here 85 feet from that slab.

Mr. Whittaker: If the Court please, we object to this evidence upon the ground that it is not the best evidence or the manner in which to prove the location of city limits.

The Court: If that is important, of course, this witness has not shown himself competent to testify.

Q. Did you see any sign such as the whistling posts were on the railroad track, any sign that you have reproduced here?

A. Yes, sir.

Q. And what was that sign, describe what it was?

A. It was the city limit sign.

Q. What was on it?

[fol. 32] A. I just forget the exact words on it but it was a sign indicating the city limits.

Mr. Whittaker: Now, if the Court please, we move the answer of the witness be stricken out for the reason——

The Court: The latter part of it will be stricken out, that part of it about the city limits.

Mr. O'Donnell: Exception.

Q. Did you put in your notes just what was on that sign or do you recall that?

A. I did not.

Q. Did you put something on here to indicate the thing you refer to as the city limit sign?

A. Yes, sir.

Q. Now how far was that thing west of this crossing?

A. That would be east of it.

Mr. Whittaker: We object to it, if the Court please, as assuming that it is the city limit and that matter would not be susceptible to proof of this nature.

The Court: I do not understand that this question asked for anything except the distance to this particular object that he has described. Overruled.

Mr. Whittaker: Exception.

A. That distance is 85 feet from this sign to the East edge of the concrete paving running in that entrance."

The witness described the sign referred to as being 85 feet west of the entrance to the College.

"Q. Now, will you tell the court and jury what that mark was 85 feet west, as you recall it, what was it?

A. Well, it was a sign there.

Q. Well, what was it, wood or iron, or what was it?

A. It was a wooden sign, painted white.

Q. Was it stuck in the ground or suspended or what?
A. It was put in the ground like an ordinary sign.
Q. Do you recall the exact language that was on it?
A. No, I do not.
Q. Do you recall the substance of the language?
A. Yes, sir.
Q. What was it?
A. City limits.

Mr. Whittaker: If the Court please, we ask that evidence be stricken out as not being competent evidence of the location of the City limits.

The Court: Strike it out, you can show the city limits, if that is important.

Mr. O'Donnell: Exception."

The witness ran levels from the College crossing to a point 1500 feet east of the crossing. The levels were made with a transit with a level on it. The grade was described as 0.35%, plus rises. There was a rise toward the west of practically 4 inches in each 100 feet, or five and one-fourth feet in 1500 feet. The crossing was five and one-fourth feet [fol. 33] higher than the railroad track at a point 1500 feet east of the crossing. From a point 1500 feet east of the crossing the grade was level toward the east for a distance of 400 feet. The witness noted on the plat a "Soldiers' Arch." The distance from the crossing to the center of the Arch was described as 460 feet. From the center of the crossing to a place on the track opposite the Quigley house measured 385 feet. The Quigley house was described as 200 feet south of the track. The witness described the buildings and the college grounds as varying in size. There are different kinds of buildings, one is a church, and two of them are marked "school houses" and there are two buildings there that are four-stories, one stone and the other one brick. They appeared to be dormitories and the large stone building in the rear is a two-story, and there is another three-story, and the administration building is a two-story. These buildings were described as 300 to 400 feet north of the railroad track. To the east of the crossing and entrance to the college grounds is located a grandstand upon the Athletic Field.

Cross-examination:

The witness said he did not know the conditions at the time of the accident in December, 1927. Beginning at a point 2,006 feet east of the crossing and then running toward the west for a distance of 400 feet the railroad track is practically level; and running from that point toward the crossing there is an inclining grade of 35/100ths of one per cent. From a distance 1600 feet east of the crossing going west toward the crossing, the track goes up slightly. The railroad at this place is a single track road. Highway No. 40 parallels the railroad track and lies to the south. The distance is 71½ feet from the south rail of the railroad track to the north side of the slab on Highway No. 40. The highway was not paved with a slab in 1927. Measurements were taken by the witness at the crossing and at a point 200 feet east of the crossing and the road and slab run parallel for that distance. At a distance of 300 feet east of the crossing the highway does not run exactly parallel with the railroad. The highway veers slightly to the south and then goes on east again, approximately 160 feet from the track for a distance of probably half a mile. Highway No. 40 is a main artery of travel from Kansas City to Lawrence, Topeka, Fort Riley, St. Marys, Abilene, Salina and Denver. The railroad track from the crossing east to a point 2,006 feet east of the crossing is built up some higher than the adjacent land, on a grade and ballast. At a distance of 2,000 feet east of the crossing the railroad track is [fol. 34] four or five feet higher than the abutting land, and slopes to the west until at the crossing the railroad track is about two or two and a half feet higher than the adjacent land. The railroad track from a point 2,009 feet east of the crossing makes no curves or bends and there is a clear view through there. There are no buildings or hills south of the railroad track to obstruct the view and no cuts of any consequence.

"Mr. Whittaker: The railroad track as constructed there would be visible to one standing upon the highway at any point from a distance 2,009 feet east of the crossing up to the crossing, wouldn't it?

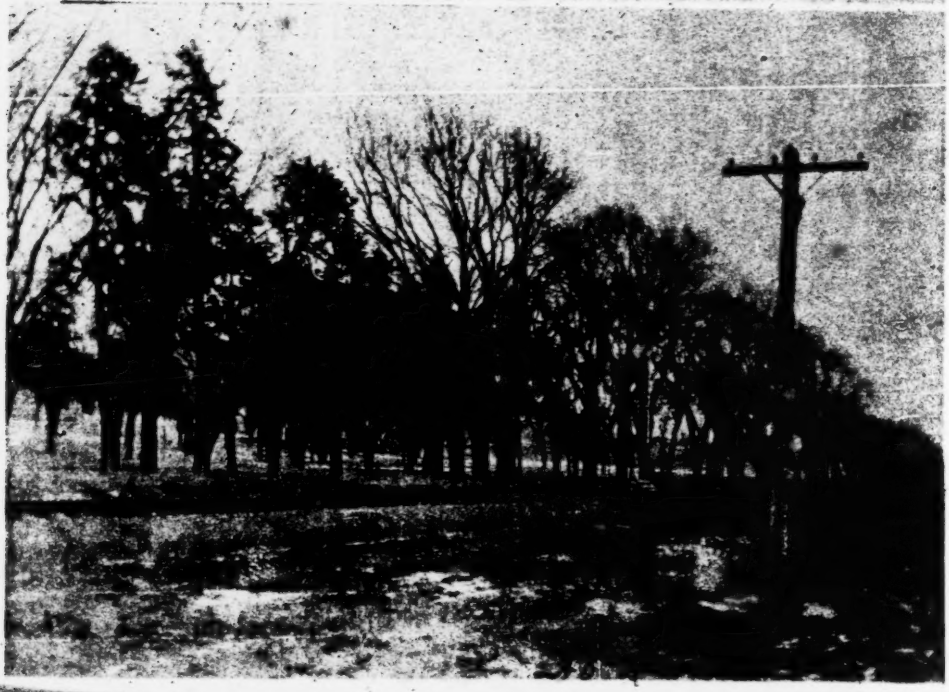
Mr. O'Donnell: It may be agreed that what you say is correct about it, that there is no obstruction of any character."

The defendant's Exhibits A, B, C, D, E, F and G, were shown to and identified by the witness and he described the conditions that he found about as shown in these pictures. Exhibit "A" is a photograph of this crossing with the camera pointed north and slightly east. Exhibit "B" is a photograph of the view toward the east of the crossing taken with the camera directed toward the northeast and stationed at the northeast corner of the intersection of Highway No. 40 and the roadway leading to the College. Exhibit "C" is a photograph looking east and slightly south, the camera being stationed in the center of the track ninety feet west of the crossing. Exhibit "D" is a photograph taken with the camera stationed approximately thirteen feet south of the south rail of the track and on the east side of the roadway leading over the track and into the College, the camera facing straight east. Exhibit "E" is a kodak picture, looking east, taken from a point forty-five feet south of the south rail of the railroad track and approximately in the center of the roadway leading to the College. Exhibit "F" is a kodak picture taken from a point four or five feet east of the crossing and a little south of the crossing, looking east. Exhibit "G" is a kodak picture, looking toward the east and slightly north, the kodak being held at the northeast corner of the intersection of Highway No. 40 and the road leading north over the crossing. Exhibits A, B, C, D, E, F, and G, were offered and received in evidence and are as follows:

(Here follow exhibits, side folios 34a, b, and c)

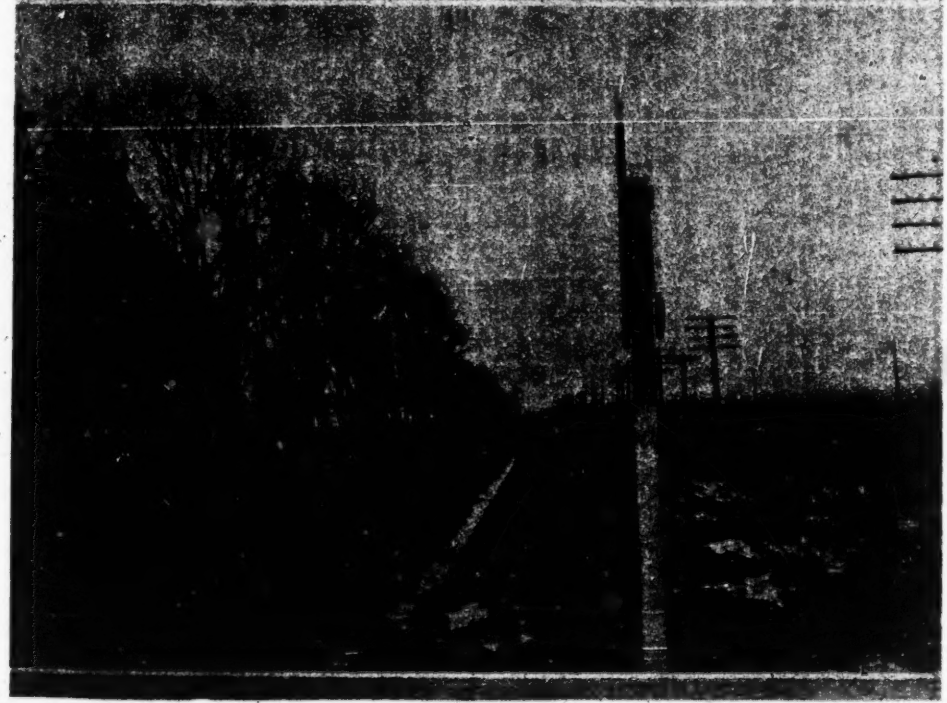
Defendants Exhibit 34a

Defendants Exhibit B.



Defendants Exhibit "C" 34b

Defendants Exhibit "D"



Defendants Exhibit

Defendants

Defendants Exhibit

[fol. 35] "Q. Now, referring to Exhibits C, D, E and F, I will ask you to state whether or not it is possible to see in those pictures the railroad track as far east as that point you have mentioned 2,006 feet east of this crossing?

A. There is no doubt about that.

Q. And you can see even further and beyond?

A. Yes, sir.

Q. You can see down there for three-quarters of a mile at least, Mr. Koehler?

A. Approximately so, I would say."

The crossing over the railroad track leads from the public highway to St. Marys College and is an entrance to the College from the south. On the west side of the College and some distance north of the railroad track is another roadway that leads into the College, known as "Mission Street." The roadway that leads over the crossing and into St. Marys College is an entrance to the College. Within the College grounds there are drives, roadways, and paths that wind around the various buildings and you can enter and leave the College grounds over the crossing in question or you can enter and leave through Mission Street that runs into the College grounds at the west side of the College. There is a whistling post located 1200 feet west of the west side of the crossing, but witness did not know how long it had been there.

Re-direct examination.

By Mr. O'Donnell:

The whistling post to the west was 1,290 feet from the crossing. Witness identified Plaintiff's Exhibit "7" as a photograph of the entrance to the College grounds as he saw it. Plaintiff's Exhibit "2" was identified as a photograph of the same crossing, showing the crossing and No. 40 Highway, also the crossing sign and the railroad track. Plaintiff's Exhibit "3" was identified as a photograph from the crossing, looking west and south toward No. 40 Highway. This exhibit showed the residences to the southwest. Plaintiff's Exhibit "4" was identified as a photograph, looking east and south, showing the crossing, the railroad track and the highway. Plaintiff's Exhibit "5" was identified as another picture of the crossing, looking northeast. Plain-

tiff's Exhibit "6" was identified as a picture taken from a [fol. 36] point east of the crossing, looking west, showing the railroad track and No. 40 Highway and the houses to the south of No. 40 Highway. The plaintiff offered Exhibits 2, 3, 4, 5, 6 and 7, in evidence.

"The Court; The exhibits will now be received.

Said Exhibits 2, 3, 4, 5, 6 and 7 are as follows:

(Side folios 36a and 36b)

Plaintiff Exhibit 2"

36a

looking West

Plaintiff

looking West

Plaintiffs Exhibit 2"

looking East

60

36b

Looking East on Little Rock

Plaintiffs Exhibit 6

Looking West on right of way

Plaintiffs Exhibit 7

Looking North at Entrance on Highway

[fol. 37] Mr. Whittaker: Mr. O'Donnell, may it be admitted that the photographs offered as exhibits by plaintiff and the photographs offered as exhibits by defendant show the true physical conditions existing as of December 11, 1927, with the exception of the slab that has been subsequently put in the paving.

Mr. O'Donnell: Well, I expect that is the fact about it, although I have no personal knowledge of it, if you say so.

Mr. Whittaker: They are. Our pictures were taken the next morning.

Mr. O'Donnell: All right."

Redirect examination.

By Mr. O'Donnell resumed:

"Q. Now, Mr. Koehler, I notice that Mr. Whittaker has been referring to this entrance as a private road, do you know where he gets that, Mr. Koehler, do you know why he asks that question, do you know anything about that?

A. No, I do not.

Q. Well, I notice in Defendant's Exhibit 'A' there is a railroad crossing sign over the crossing, now you may state whether or not that crossing sign, so that the record will get it, is the same sort of crossing sign as there is for any crossing that you may see as you go up there?

A. Yes, sir.

Q. All the same?

A. Practically the same.

Q. Well, is there any difference?

A. No, I don't know if there is any difference in the size of it, but it is the cross arm sign you see at all railroads, nearly all of them."

Mrs. Agnes Miller, called as a witness, testified that she was a sister of Mrs. Andlauer, the deceased; that Mrs. Andlauer was thirty-five years of age, in good health, the mother of three children, Clement, a boy aged fourteen; Ellanore, a girl aged twelve, and Mary Jane, a girl aged nine; that Mrs. Andlauer was the wife of Marcus Andlauer, the deceased; that they lived in Topeka, Kansas; that Mrs. Andlauer was employed about her domestic duties around

the home and that Mr. Andlauer was employed at the time of his decease. She testified that Mrs. Andlauer took care of the home and the children and that she did her own household duties and had no maid.

Miss ELLANORE ANDLAUER, called as a witness, testified that she was sixteen years of age at the time of the trial and was making her home with Mrs. Miller, her aunt; that [fol. 38] her brother at the time of the accident was attending college at St. Marys, Kansas, and that her parents were on the way to visit this brother at the time of the accident; that her mother's health at the time she left home on the fateful day was good.

WILLIAM H. MILLER, called as a witness, testified that he is a mechanical engineer in the employ of the Ismert-Hincke Milling Co.; that he knew Marcus Andlauer for twenty-five years. Witness had been with the Milling Company since August 1, 1907; that Mrs. Andlauer was the sister of witness's wife and at the time of his death Marcus Andlauer was with the Ismert-Hincke Milling Company and had charge of the Topeka Mill and also called on some customers; that he had been with the Milling Company for twelve or fifteen years prior to his death; that he had worked in different departments and had been advanced to his position before his death; that he had been a salesman and St. Marys, Kansas was on his route as such; that he visited St. Marys, Kansas, either once a week or every other week, selling the product of the Milling Company; that the son of Marcus Andlauer was attending school at St. Marys, Kansas; that Mr. and Mrs. Andlauer visited the son most every Sunday; that Mr. Andlauer was accustomed to driving automobiles and had been so accustomed for about five years; that witness first heard of the accident about four o'clock on Sunday afternoon, December 11, 1927; that he immediately went to Topeka and found the bodies had not been brought back from St. Marys; that he saw the bodies on the 12th, the day after the accident, and recognized them; that Mr. Andlauer's income was $200.00 a month; that Mrs. Andlauer attended to the household duties and had no maid; that she was strong and healthy and took care

of her children; that he was appointed guardian and administrator.

"Mr. O'Donnell: I offer in evidence Plaintiff's Exhibits 8, 9 and 10.

Mr. Whittaker: If the Court please, we object to the introduction of Plaintiff's Exhibit 10, letters of guardianship, as having no bearing upon any issue in this case and being wholly incompetent, irrelevant and immaterial.

Mr. O'Donnell: The only purpose of offering those is in response to his plea in abatement.

The Court: It is overruled.

Mr. Whittaker: Exception."

Plaintiff's Exhibits 8, 9 and 10 were received in evidence and are hereto attached and are as follows:

[fol. 39] PLAINTIFF'S EXHIBIT "8"

Letters of Administration

THE STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

To all to whom these presents shall come, Greeting:

Know ye, That whereas Mark A. Andlauer late of said County of Shawnee, died, intestate, as it is said, having at the time of his death, property in this State which may be lost, destroyed or diminished in value if speedy care be not taken of the same: To the end, therefore, that said property may be collected, preserved and disposed of according to law, we do hereby constitute and appoint William H. Miller, of Wyandotte County, Administrator of all and singular the goods and chattels, rights and credits which were of the said Mark A. Andlauer at the time of his death, with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased, and in general to do and perform all other acts and things which are or hereafter may be required of him by law or the decree or order of any Court having jurisdiction.

In Testimony Whereof, I, W. T. Chaney, Judge of the Probate Court in and for said County, do hereto set my

hand and affix the seal of said Court, this 16th day of December, A. D. 1927.

W. T. Chaney, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

I, W. T. Chaney, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the records, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, true and correct copy of Letters of Administration, in the Matter of the Estate of Mark A. Andlauer, Deceased, as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 25th day of January, 1928.

W. T. Chaney, Probate Judge and ex-Officio Clerk. (Seal.)

[fol. 40] PLAINTIFF'S EXHIBIT "9"

Letters of Administration

THE STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

To all to whom these presents shall come, Greeting:

Know ye, That whereas Ellanore Andlauer, late of said County of Shawnee, died, intestate, as it is said, having at the time of her death, property in this State which may be lost, destroyed or diminished in value if speedy care be not taken of the same: To the end, therefore, that said property may be collected, preserved and disposed of according to law, we do hereby constitute and appoint William H. Miller, of Wyandotte County, Administrator of all and singular, the goods and chattels, rights and credits which

were of the said Ellanore Andlauer, at the time of her death, with full power and authority to secure and dispose of said property according to law, and collect all moneys due said deceased, and in general to do and perform all other acts and things which are or hereafter may be required of him by law or the decree or order of any Court having jurisdiction.

In Testimony Whereof, I, W. T. Chaney, Judge of the Probate Court in and for said County, do hereto set my hand and affix the seal of said Court, this 16th day of December, A. D. 1927.

W. T. Chaney, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

I, W. T. Chaney, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the record-, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, a true and correct copy of Letters of Administration, in the Matter of the Estate of Ellanore Andlauer, Deceased, as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 25th day of January, 1928.

W. T. Chaney, Probate Judge and ex-Officio Clerk.
(Seal.)

[fol. 41] PLAINTIFF'S EXHIBIT "10"

Letters of Guardianship

IN PROBATE COURT

THE STATE OF KANSAS,
Shawnee County, ss:

To all to whom these presents shall come, Greeting;

Know ye, That whereas, Clement Andlauer, Eleanor Andlauer and Mary Jane Andlauer, Minors, have property,

rights and credits, in said county and elsewhere, that may be lost, destroyed, or diminished in value, if speedy and proper care be not taken of the same: to the end, therefore, that the estate, rights and property, and the person of the said minors be properly cared for and protected, I, W. T. Chaney, Probate Judge in and for the aforesaid county, do hereby constitute and appoint William H. Miller of Wyandotte county, Guardian of the persons, estate and property of whatsoever kind that may appertain or belong to said minors; with full power and authority to collect and dispose of any or all their estate, property, rights and credits, according to law; and in general, to do and perform all other acts and things which are, or hereafter may be, required of him by law or the decree of any court having jurisdiction.

In testimony whereof, I, W. T. Chaney, Judge of the Probate Court in and for said county, do hereto set my hand and affix the seal of said court, this 16th day of December, 1927.

W. T. Chaney, Probate Judge. (Seal.)

State of Kansas,
Shawnee County, ss:

In Probate Court

I, W. T. Chaney, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the records, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, true and correct copy of Letters of Guardianship, in the Matter of the Estate of Clement Andlauer, et al. Minors, as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 11th day of January, 1928.

W. T. Chaney, Probate Judge and ex-Officio Clerk.
(Seal.)

[fol. 42] "Mr. O'Donnell: We now offer Plaintiff's Exhibits 11 and 12, these being the orders of the Probate

Court reopening these estates and directing him to take charge on the 25th day of February, 1931.

Mr. Whittaker: If the Court please, the instruments speak for themselves. We object to the interpretation of them by counsel as to reopening, and they speak for themselves.

The Court: Overruled; the instruments will be admitted for what the instruments show.

Mr. Whittaker: Exception."

Plaintiff's Exhibits 11 and 12 were admitted in evidence and are hereto attached and are as follows:

PLAINTIFF'S EXHIBIT 11

B. M.

IN THE PROBATE COURT OF SHAWNEE COUNTY, KANSAS

No. 9868

In the Matter of the Estate of MARK A. ANDLAUER, Deceased

Order

Now on this 25th day of February, 1931 comes on for hearing the application of William H. Miller for an order reopening the above estate.

Thereupon the Court Finds that Mark A. Andlauer died on the 11th day of December, 1927, intestate and that his estate was admitted to probate and administered and the estate closed on the 25th day of February, 1929; that it now appears that there is due the sum of ten thousand dollars to the estate from the Union Pacific Railway Company on account of the wrongful death of Mark A. Andlauer.

The Court Further Finds that William H. Miller is a resident of the State of Kansas and a competent, worthy and suitable person to assume the duties of administrator of said estate.

The Court Further Finds that the application to reopen said estate should be granted.

It Is Therefore By the Court Ordered and Decreed that the above estate be and the same is hereby reopened.

It Is Further Ordered that William H. Miller be and he is hereby appointed administrator herein and that he

execute his administrator's bond in the principal sum of $50.00 with conditions and sureties according to law.

J. F. Kaster, Probate Judge. (Seal.)

[fol. 43] STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

I, J. F. Kaster, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the records, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, true and correct copy of the Order dated February 25, 1931, in the Matter of the Estate of Mark A. Andlauer, deceased as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 25th day of February, 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.

PLAINTIFF'S EXHIBIT 12

B. M.

In the Probate Court of Shawnee County, Kansas

No. 9862

In the Matter of the Estate of ELLANORE ANDLAUER, Deceased

Order

Now on this 25th day of February, 1931 comes on for hearing the application of William H. Miller for an order reopening the above estate.

Thereupon the Court Finds that Ellanore Andlauer died on the 11th day of December, 1927, intestate and that her estate was admitted to probate and administered and

the estate closed on the 25th day of February, 1929; that it now appears that there is due the sum of ten thousand dollars to the estate from the Union Pacific Railway Company on account of the wrongful death of Ellanore Andlauer.

The Court Further Finds that William H. Miller is a resident of the State of Kansas and a competent, worthy and suitable person to assume the duties of administrator of said estate.

The Court Further Finds that the application to reopen said estate should be granted.

It Is Therefore By the Court Ordered and Decreed that the above estate be and the same is hereby reopened.

[fol. 44] It Is Further Ordered That William H. Miller be and he is hereby appointed administrator herein and that he execute his administrator's bond in the principal sum of $50.00 with conditions and sureties according to law.

J. F. Kaster, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

IN PROBATE COURT

I, J. F. Kaster, Judge and ex-officio Clerk of the Probate Court within and for the County of Shawnee and State of Kansas, having by law the custody of the seal and all the records, books, documents, files and papers of and pertaining to said Court, hereby certify that the above and foregoing is a full, true and correct copy of the Order dated February 25, 1931, in the Matter of the Estate of Ellanore Andlauer, deceased as the same appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the City of Topeka, in said County and State, this 25th day of February, 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.
(Seal.)

Cross-examination:

Witness testified that he was discharged as administrator of the estates of Marcus Andlauer and Ellanore And-

lauer about the 25th day of February, 1929, by the Probate Court of Shawnee County, Kansas.

"Mr. Whittaker: Now we offer in evidence, if the Court please, Defendant's Exhibits H and I.

The Court: Received."

Defendant's Exhibits H and I, so admitted in evidence, are as follows:

DEFENDANT'S EXHIBIT "H"

STATE OF KANSAS,
Shawnee County:

IN THE PROBATE COURT OF SAID COUNTY

In the Matter of the Estate of MARK ANDLAUER, Deceased

Journal Entry—Final Discharge

And Now, on this 25th day of February, 1929, came William H. Miller the Administrator of the above-named [fol. 45] estate and makes payment of Court costs of said estate for the several sums ordered to be paid to said heirs and legatees by this Court, at the hearing of the final account of said William H. Miller as such Administrator, on the 25th day of February, 1929.

And it being made to appear to the Court that said Administrator has fully complied with said order of the Court in every particular,

Now, Therefore, It is by the Court considered, ordered and adjudged, that said estate be, and it is hereby, fully and finally closed.

And it is further considered, ordered and adjudged, that said Administrator and his sureties be and they are hereby discharged and released from any and all further liability on the bond of said William H. Miller as such Administrator.

W. T. Chaney, Probate Judge. (Seal.)

Probate Judge's Certificate of Copy with Verification

STATE OF KANSAS,
Shawnee County, ss:

PROBATE COURT

I, J. F. Kaster, sole Judge and ex officio Clerk of the Probate Court, within and for the County aforesaid, do

hereby certify the foregoing to be a true copy of Journal Entry of Final Discharge, in the Matter of the Estate of Mark Andlauer, Deceased, as the same appears from the records of said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.
(Seal.)

STATE OF KANSAS,
Shawnee County, ss:

I, J. F. Kaster, sole Judge of the Probate Court, within and for said County, the same being a Court of Law and Record, hereby certify that the signature attached to the above certificate purporting to be that of J. F. Kaster, is his genuine signature, and that he was at the time thereof ex officio Clerk of said Probate Court, and as such full faith and credit are due his acts, and that the attestation of said Clerk is in due form of law, and by the proper officer.

[fol. 46] Witness my hand and the seal of said Court, at Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

I, J. F. Kaster, Probate Judge and ex officio Clerk of the Probate Court in and for the said County, do hereby certify that J. F. Kaster, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof Presiding Judge of said Court, duly commissioned, sworn and acting.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at the city of Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.
(Seal.)

DEFENDANT'S EXHIBIT "I."

STATE OF KANSAS,
Shawnee County:

IN THE PROBATE COURT OF SAID COUNTY

In the Matter of the Estate of ELLANORE ANDLAUER, Deceased

Journal Entry—Final Discharge

And Now, on this 25th day of February, 1929, came William H. Miller the Administrator of the above-named estate, and makes payment of Court costs, and files receipts of the Guardian of the Andlauer, minors of said estate for the sums ordered to be paid to said Guardian by this Court, at the hearing of the final account of said William H. Miller, as such Administrator, on the 25th day of February, 1929.

And it being made to appear to the Court that said Administrator has fully complied with said order of the Court in every particular,

Now, Therefore, It is by the Court considered, ordered and adjudged, that said estate be, and it is hereby, fully and finally closed.

And it is further considered, ordered and adjudged, that said Administrator and his sureties be and they are [fol. 47] hereby discharged and released from any and all further liability on the bond of said William H. Miller as such Administrator.

W. T. Chaney, Probate Judge. (Seal.)

Probate Judge's Certificate of Copy, with Verification

STATE OF KANSAS,
Shawnee County, ss:

PROBATE COURT

I, J. F. Kaster, sole Judge and ex officio Clerk of the Probate Court, within and for the County aforesaid, do hereby certify the foregoing to be a true copy of Journal Entry of Final Discharge, in the Matter of the Estate of

Ellanore Andlauer, Deceased, as the same appears from the records of said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk.
(Seal.)

STATE OF KANSAS,
Shawnee County, ss:

I, J. F. Kaster, sole Judge of the Probate Court, within and for said County, the same being a Court of Law and Record, hereby certify that the signature attached to the above certificate purporting to be that of J. F. Kaster, is his genuine signature, and that he was at the time thereof ex officio Clerk of said Probate Court, and as such full faith and credit are due his acts, and that the attestation of said Clerk is in due form of law, and by the proper officer.

Witness my hand and the seal of said Court, at Topeka, Shawnee County, Kansas, this 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge. (Seal.)

STATE OF KANSAS,
Shawnee County, ss:

I, J. F. Kaster, Probate Judge and ex officio Clerk of the Probate Court, in and for said County, do hereby certify that J. F. Kaster, whose genuine signature is subscribed to the foregoing certificate, was at the date thereof [fol. 48] Presiding Judge of said Court, duly commissioned, sworn and acting.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at the city of Topeka, Shawnee County, Kansas, this the 13th day of February, A. D. 1931.

J. F. Kaster, Probate Judge and ex-Officio Clerk of the Probate Court. (Seal.)

Witness testified that both Mr. and Mrs. Andlauer were in good health.

"Q. And they had, did they, normal eyesight?
A. Yes, sir.

Q. And normal hearing?
A. Yes, sir.
Q. No defects in those respects?
A. Not that I know of.
Q. And, of course, you would have known had such existed?
A. I think so."

MARY JANE ANDLAUER, called as a witness, testified that at the time of the trial she was thirteen years of age; that the mother took care of the children in the home, taking them to church and looking after them.

ARTHUR NAGLE, called as a witness, testified that he was twenty-eight years of age, lived in Havensville, Kansas, and was a garage owner; that he lived in St. Marys, Kansas, for five years; that while in St. Marys he was in the transfer business, working for his father, and driving a truck in and out of the city; that he was familiar with the streets of St. Marys and knew the location of Highway No. 40; that Highway No. 40 is the principal business street and it runs east and west through the town of St. Marys, Kansas; that the railroad track runs north of Highway No. 40 and parallel thereto; that he was familiar with the automobile entrance from U. S. Highway No. 40 to St. Marys College grounds, which entrance is about a half mile east of the main business part of St. Marys; that the residences along the south side of Highway No. 40 extended down to a point about 100 feet west of the entrance from Highway No. 40 to the College grounds; that the residences lined the south side of Highway No. 40; that [fol. 49] witness lived for a time in Emmett, Kansas, about eight miles away from St. Marys and witness was frequently in and around St. Marys; that he was familiar with the roads in St. Marys and has been for twenty years. Witness identified the entrance to St. Marys College from Highway No. 40, as shown on the exhibits. The entrance had existed, as shown in the pictures, for as long as the witness could remember; that the railroad cross-

ing sign shown on the exhibits had been located at this crossing and entrance to St. Marys College for as long as witness could remember; that witness, in driving the trucks about St. Marys, used this entrance most every day; that there were two entrances to the college grounds and that these were connected with cinder roads; that the crossing from Highway No. 40 to the College grounds was at all times open to the public and was much used; that St. Marys is a town of 1500 population; that between 1,000 and 1500 students attended the College and there were about 100 teachers and instructors and Priests located there; that the students mostly lived at the college in dormitories and on Sunday, in particular, there was more or less activity about the College grounds, more on Sunday than during the ordinary week day, on account of the visiting; that after witness moved away from St. Marys, he was back for the weekends visiting his folks; that No. 40 on the 11th day of December, 1927, was a graveled road; that the gravel at that time occupied about the same width that the slab does at the present time and was located in the same place as the present slab; that the gravel was possibly 10 feet wider than the present slab; that he did not know Mr. Andlauer during his lifetime. He saw the deceased on the day of the accident about twelve miles out of Topeka, driving on the highway in a westerly direction; that deceased was driving an Oldsmobile, closed car; that deceased passed the witness and that between the time he first saw deceased and the time of the accident he and deceased would slow up and he would go around him, then he would slow up and the deceased would drive around witness; that the public road crossed the railway tracks about a mile east of the College entrance; that he was familiar with the whistling post located east of the entrance to the college; that deceased passed witness last about a half mile east of the college entrance; that witness was driving an Oldsmobile sports roadster, which was an open car with no side curtains; that his hearing was good; that he did not hear any whistle from the engine of the train that struck deceased; that he had driven the road many times before and could hear the whistles of trains [fol. 50] at the whistling post east of the crossing on other occasions; that the weather was clear and cold.

"Mr. Kelly:

Q. And where were you when the collision occurred?

A. About five hundred feet East of the entrance to the college."

That when deceased last passed witness, witness was driving about 30 miles an hour and the speed of deceased was slightly faster. Witness saw deceased slow up and make a turn and drive right up on the track and the train hit him; that deceased turned at right angles to No. 40 and drove north to the railroad track; that deceased after making the turn was not going any faster than 15 miles an hour and no slower than 10. Witness' best judgment was deceased was driving about twelve miles an hour from the time he made the turn until the collision. That witness' attention was first directed to the train when it passed him about five hundred feet east of the crossing; that he had not heard the train before and had not heard any bell or whistle; that there was nothing to prevent him hearing the bell or whistle, if one had been sounded; that the car he was driving was one which did not make an unusual amount of noise and that he had driven the same car before and that he could and had heard the whistle of trains at other times while driving this same car; that he saw the actual collision between the train and the automobile and that witness was about 200 feet east of the crossing when the collision occurred; that there was a mile sign on the south side of Highway No. 40 which tells the distance between one town and another at about the place where witness' car was located when the collision occurred. Witness identified the mile sign on the plat introduced in evidence; that witness was familiar with speed from his experience in driving automobiles and he fixed the speed of the passenger train at 55 to 60 miles an hour. Witness was driving at thirty miles an hour and the train was going as fast again.

At this point WILLIAM H. MILLER was recalled and testified that Marcus Andlauer made frequent visits to St. Marys, Kansas, and vicinity; that he was supposed to call on his customers there every two weeks; that deceased

frequently took the train of the Union Pacific Railway Company that left Kansas City at 10:40 in the morning; that Marcus Andlauer visited his son at St. Marys College most every Sunday, from September until the date of the accident. Witness testified that Andlauer before 1927, [fol. 51] used to take the train that collided with his car quite often but after July, 1927, they bought him a car and he did not use the train so much thereafter.

On re-cross examination, Mr. Miller testified that his headquarters is in Kansas City, but he has charge of the Topeka Mill also; that he had seen Mr. Andlauer take the train at Topeka, but not always; that at times when he was in Topeka over night he would take him to the train in the morning. He could only recall one specific instance where he had taken him to catch the train that was involved in the accident.

Arthur Nagle, recalled, testified that the train involved in the collision was due at St. Marys at 1:18 P. M.; that the train was about an hour and one-half late on the day of the accident.

"Q. Had you observed this particular train going through there many times during the time you were living in St. Marys and the times you have been around there?

A. Yes, sir.

Q. Had you observed the custom of that train as it approached that particular crossing as to speed?

Mr. Whittaker: If the Court please, we object to that question as having no bearing upon this lawsuit, not directed to any issue involved in the case, does not show or tend to show any knowledge on the part of decedents with reference to speed of this train and we object to it.

The Court: Objection overruled at this time.

Mr. Whittaker: Exception.

A. It usually slowed up.

Q. To about what speed as it crossed that crossing?

A. About twenty-five to thirty miles an hour."

That at the time of the impact, witness could see the rear end of the Andlauer car; that the Andlauer car was about

nine and one-half feet long; that the rear wheels of the car were about on the south rail at the time of the impact and the automobile was going directly north; that the train ran about four and one-half blocks after the collision before it stopped; that the train stopped at a place on the track directly behind the residence of Mrs. Buchholz; that witness drove after the collision down to a place on the highway and stopped almost up to the train and then witness went over to the train; that the automobile was in front of the cow-catcher, partly on the train; that the body of Mr. Andlauer was under the wreckage; that Mr. Andlauer was dead when witness arrived at the wreckage; that Mrs. Andlauer was in the car and was unconscious and died about twenty-five minutes thereafter; that Mrs. Andlauer [fol. 52] was carried while still alive into the residence of Mrs. Buchholz, where she died; that witness was present when she died twenty-five minutes later.

On cross examination witness testified he left Topeka about 2:30 in the afternoon; that Topeka is 26 miles east of St. Marys; that Mr. and Mrs. Andlauer passed witness first when about twelve miles west of Topeka; that there is a railroad crossing one mile east of St. Marys College, known as the "Iminshook Crossing"; that witness noticed the semaphore was up when he crossed the Iminshook Crossing but he did not know that this indicated that a train was approaching within the block; that after crossing the Iminshook Crossing, witness traveled about thirty miles an hour; that when witness was a half mile from St. Marys College the Andlauer car passed him; that witness was traveling 25 to 30 miles an hour when Andlauer passed; that Andlauer was going five or possibly ten miles per hour faster than witness' car when it passed him.

"Q. And when you were within five hundred feet of this crossing you say you saw the train coming?

A. It passed me.

Q. Then, of course. you saw it?

A. Yes, sir.

Q. And at that time the train was somewhat ahead of you, the engine?

A. Yes, sir.

Q. And then Mr. and Mrs. Andlauer had only just prior to that passed you on 40 highway?

A. They passed me a lot further back than that.

Q. Half a mile back?

A. Yes, sir.

Q. So where were they, where was their automobile when you saw the train come up past you going West?

A. Well, it just left the highway, pulling into the College.

Q. Just leaving 40 highway turning toward the North?

A. They were already headed North.

Q. Just headed North, is that your answer?

A. They were off the slab already.

Q. But just starting into this road that leads in to the college?

A. Yes, sir.

Q. How far ahead of you was the train then?

A. I cannot answer that question; they went by me driving faster than I was.

Q. And you say your judgment was the train was going fifty-five to sixty?

A. I was traveling thirty and they pass me.

Q. That you say was your judgment that the train was going fifty-five to sixty miles an hour?

A. Yes, sir.

Q. And how fast was the automobile of the Andlauer's traveling?

[fol. 53] A. It couldn't have been traveling over twelve miles an hour making that turn.

Q. The train would be then within not more than four hundred feet of the crossing toward the East and in plain sight, wouldn't it?

The Court: Plain sight of whom?

Q. Of any person in the position in which the Andlauer car was?

A. About two hundred feet then when I noticed it had appeared.

Q. The train was about two hundred feet then of the crossing, is that what you mean to say?

A. Yes, sir.

Q. And that is just after the Andlauers had turned the corner and started North?

A. Yes, sir.

Q. You say it was a clear, cold day?

A. Yes, sir."

The accident happened about 3:30 o'clock, somewhere in there. Trains passed over this track at all hours of the day and night of varying sizes and speed. The witness did not know whether the day was sufficiently cold that normal persons would have the windows of their car closed, but does know that the north window of the Andlauer car was closed as it passed him.

ERNEST QUIGLEY testified as follows: That he lived at St. Marys, Kansas. He had lived there since October 2, 1902. He is an umpire in the National League of Baseball Clubs and an athletic official, refereeing football games and basketball games. He was director of athletics in St. Marys College from October 1, 1902, until April 1, 1914. He had attended the University of Kansas. His home was located about 200 feet from the crossing of Highway No. 40 into St. Marys College. The population of St. Marys was described as 1,130 and there were 500 students in St. Marys College and in addition 56 professors in the College. The crossing in question was used very generally for entrance to the College ground. It connects with the road going west to the administration building and to Mission Street. The train involved in the collision was due to arrive at St. Marys from the east at 1:18 P. M. The witness was sitting in his home when his attention was attracted to the train involved in the collision. He was sitting on the davenport talking to Mrs. Quigley. The witness should have been on that train was the reason that it came to his attention. He went home that day on the motor train and the train not having come in, the witness realized that he had gotten home an hour or so before he would have been home had he come on that train and when witness heard the train coming he realized that it was coming with speed and the speed of the train and [fol. 54] the impact of hitting something and the shrieking of some group of children across the right-of-way attracted the witness. Witness saw the train as it passed his home, but did not see it before. From witness' experience in driving automobiles and from watching athletes he was a judge of speed. His estimate was that the train was going fifty miles an hour when he saw it. Witness, from within his house, heard the rumble of the approaching train before

he heard the impact. Witness identified the location of his house on Plaintiff's Exhibit 6. Witness testified that his house was approximately 200 feet from the crossing in a diagonal direction to the southwest; that he did not hear any whistle and did not hear any bell sounded by the train at any time; that after the accident witness put on his sweater and went over to the scene; that the engine stopped just behind the residence of Mrs. Buchholz. Some attention had been given to the two bodies but his particular attention was directed towards the lady. She was very seriously injured, but she was not dead at that time; that witness at that time lived in the city of St. Marys, Kansas.

ARTHUR NAGLE, recalled and testified that Mr. Andlauer was driving the Andlauer car.

RALPH L. GOOLD, 39 years of age, testified that his business was in the Transportation Department of railroad work; that he had been so engaged for fifteen years as a locomotive fireman and also as an emergency engineer; that he had worked on the Missouri Pacific, the Omaha Division, and also on the Santa Fe, in the Eastern Division. That he ran engines in emergencies when there wasn't regular engineers. That he was familiar with the method used by engineers in giving the warning as the train approached crossings; that it takes an engineer just long enough to reach the cord and pull it to sound his whistle; that he knew the character of brakes used on passenger trains; that he was familiar with air brakes; that it takes just long enough to remove the handle of the brake lever to put it in the position you want it in, emergency, or running position, or wherever you want it. That a passenger train of the size of the train in question, going fifty to sixty miles an hour could be stopped in 500 to 1,000 feet, with safety to the passengers on the train; that when the air is applied, it applies to the drive wheels on the engine and also to the tank wheels and [fol. 55] all wheels underneath all the rest of the equipment. The brakes used apply to all wheels.

On cross-examination, witness testified he had never worked for the Union Pacific; that he did not see the train

in question, but that he was familiar with the class of engines that they use on those trains; that he did not know what this engine was, nor know its weight, and never saw or examined the braking apparatus of that particular engine, nor had he been in any of the cars on that particular place on that line of railroad. Witness never had a regular run operating a passenger train and never operated a passenger train in the regular service.

"Mr. O'Donnell: We offer in evidence Section 130 of the Revised Ordinances of St. Marys, Kansas, 1924, contained in the bound volume marked Revised Ordinances of the City of St. Marys, Kansas, 1924. A compilation of all the ordinances of a general nature up to and including Ordinance Number 451, passed by the City Commission and rules and order of business. Revised and compiled by John G. Stutz, Secretary League of Kansas Municipalities, Harvey Walker, Assistant Secretary, League of Kansas Municipalities, Lawrence, Kansas, published by authority of the City of St. Marys, January, 1925.

Mr. Whittaker: We object to that for the reason in the first place it is not the proper way to prove such an ordinance, and in the second place it is wholly incompetent, irrelevant and immaterial to any issue in this case; in the third place it is not pleaded and no issue in this case and is not competent for any purpose.

The Court: Certainly the first ground is well taken, but I will inquire of counsel now, have you any authorities that you care to call the Court's attention to that the ordinances if properly identified and offered are pertinent to the issues in this case.

Mr. O'Donnell: Well, there is a case.

The Court: I will look at it if you have one. If it is important it ought to be more particularly identified and proved and the Court will reserve its ruling on this question until you have an opportunity, if you desire to identify the ordinances by proof. Moreover, if it is competent at all and counsel is satisfied it is the ordinance, of course, the Court's time ought not to be taken up very much on the question of identification, but I will reserve the ruling on the matter until later."

Mr. O'Donnell: Your Honor please, I notice that this book has the certificate of the Clerk with the seal of the [fol. 56] City and also I have the Kansas and Missouri statutes holding that it is competent and also a decision of the Missouri Supreme Court holding that an ordinance under these circumstances is admissable. We now offer Section 130.

Mr. Whittaker: We renew our objection on the ground that it is wholly incompetent, irrelevant and immaterial to any issue in this case and that it has not been properly pleaded or proved in the case.

The Court: Objection overruled.

Mr. Whittaker: Exception."

Said exhibit, so offered and received in evidence, reads:

OFFER IN EVIDENCE

"Section 130. Speed of Trains. Section 87.—That no person or corporation, operating or who may hereafter operate a steam railroad into or through this city shall permit any train to be operated within this city at a rate of speed in excess of twenty miles per hour nor in any manner which is dangerous to public safety. Any person or corporation violating any provisions of this section shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than one hundred dollars."

The Court: I am not clear, Gentlemen, whether the record shows in what part of the automobile Mrs. Andlauer was riding, the wife, I do not know whether it was intended to show it or not.

Mr. O'Donnell: My understanding of the evidence was that she was riding in the front seat beside her husband. If the record does not so show, it may so show.

Mr. Whittaker: That is true, that is our understanding. May it also show that this automobile was the regular left-hand drive?

Mr. O'Donnell: Yes, sir."

The plaintiff offered in evidence all of his exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, and Defendant's Exhibits A, B, C, D, E, F, G, H, and I were offered and re-

ceived in evidence, and all of said exhibits are hereto attached and made a part hereof.

"Mr. O'Donnell: Plaintiff rests."

[fol. 57] And, thereupon, plaintiff rested his case, and thereupon, after plaintiff had rested his case, Mr. Whittaker, counsel for the defendant, said:

"Defendant now offers separate demurrers as to count one and count two of plaintiff's petition and requests the Court to charge the jury as in said demurrers requested."

Said demurrers are in words and figures as follows:

DEFENDANT'S REQUESTED INSTRUCTIONS

I

"At the close of the plaintiff's evidence the defendant requests the court to charge the jury that under the law and the evidence plaintiff is not entitled to recover upon Count I of his petition and their verdict must be for the defendant on Count I of plaintiff's petition."

II

"At the close of the plaintiff's evidence the defendant requests the court to charge the jury that under the law and the evidence plaintiff is not entitled to recover upon Count II of his petition and their verdict must be for the defendant on Count II of plaintiff's petition."

DEFENDANT'S MOTION FOR DIRECTED VERDICT

"Mr. Whittaker: The defendant at the close of the evidence moves the Court in the alternative to direct a verdict for the defendant against the plaintiff or dismiss the case upon the merits with prejudice and with costs as to count one of plaintiff's petition and also as to count two of plaintiff's petition.

The Court: The Court during recess has read carefully the case plaintiff relied upon, the Can Case in which the opinion was written by Judge Reeves, and I am quite satisfied that Judge Reeves did not have in mind in that case

to in anywise reverse or change the rule of law in this Circuit laid down in the Bradley Case. It is predicated upon an entirely different state of facts, and I am sure that none of the Judges sitting with him at that time had any such intention, nor did they refer to the Bradley Case with the intention of changing it.

ORDER DISMISSING ACTION

Gentlemen of the Jury, the duties of a jury and the Court are separate and distinct. The duty of the Court is to declare the law of the case; the duty of the jury is to decide controverted questions of fact, and the jury cannot invade the jurisdiction of the Court and the Court will not invade [fol. 58] the jurisdiction of the jury. When I say controverted questions of fact I mean where there is a dispute as to what the fact is. For instance, where witnesses for plaintiff testify to one state of facts and the defendant's witnesses testify to a different state of facts, that presents a question for the jury then to determine what the facts really are. But in this case, there are no disputed questions of fact. The evidence is all on the part of the plaintiff and we assume that it is all true, but defendant says that assuming that all of the testimony on the part of the plaintiff is true, nevertheless under the law the plaintiff may not recover, so that presents a proposition of law for the Court to decide, not for the jury. The facts in this case are such that it is clearly apparent to the Court that if the jury should return a verdict the Court would be bound to set it aside, because under the facts, if all true, under the law the plaintiff may not recover in this case. The defendant's motion in the alternative is sustained, the petition and the cause of action respectively set forth in Counts One and Two of the petition are dismissed on the merits with prejudice and with costs to the defendant to be taxed by the Clerk, and the plaintiff is allowed an exception to the ruling of the Court."

And the plaintiff then and there excepted to the ruling of the court in sustaining the defendant's motion in the alternative and in dismissing the petition and causes of action

respectvely set forth in Counts One and Two of the petition, with prejudice, and in entering a judgment dismissing the said cause, with such prejudice, and for costs against the said planitiff, for the reason that under the pleadings and the evidence the plaintiff was entitled to recover and was entitled to have the cause submitted to the jury upon Count One and also upon Count Two of the plaintiff's petition and the said exceptions were taken severally and to the action of the court upon each count of the plaintiff's petition.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The above and foregoing Bill of Exceptions contains all of the evidence introduced at the trial of said cause, all of the rulings of the court, all of the exceptions allowed, all of the instructions given and asked, and each and every matter therein contained is true and correct, and the same is hereby signed, sealed, certified to and allowed as a full, true and complete bill of exceptions in and for said cause and it is ordered to be filed as a record herein and it is [fol. 59] hereby made a part of the record in said cause this 27th day of May, 1932.

Andrew Miller, United States Judge who presided at the trial of said cause and assigned for the Western Division of the Western District of Missouri.

IN UNITED STATES DISTRICT COURT

AGREEMENT AS TO BILL OF EXCEPTIONS

It is agreed by the parties hereto that the above and foregoing is a true and correct bill of exceptions in the above entitled cause.

Kelly, Buchholz & O'Donnell, Attorneys for Plaintiff. Watson, Ess, Groner, Barnett & Whittaker, Attorneys for Defendant.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 60 & 61] Appearances of counsel omitted in printing.

[fol. 62] Minute entries of argument and submission, December 13th and 14th, 1932, omitted in printing.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1932

No. 9554

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, Deceased, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Martin J. O'Donnell (Mr. George H. Kelly and Mr. William Buchholz were with him on the brief), for appellant.

Mr. C. V. Garnett (Mr. T. M. Lillard, Mr. Bruce Hurd, Mr. Charles E. Whittaker and Messrs Watson, Ess, Groner, Barnett & Whittaker were with him on the brief), for appellee.

Before Kenyon, Gardner, and Sanborn, Circuit Judges

OPINION—Filed Feb. 17, 1933

GARDNER, Circuit Judge, delivered the opinion of the court:

This is an action for damages for death by wrongful act. Plaintiff's intestates, Marcus Andlauer and Ellanore Andlauer, husband and wife, were killed on a railroad crossing

near St. Marys, Kansas, December 11, 1927. It is charged in the petition that the defendant railroad company was [fol. 64] negligent in operating its train at an excessive speed; that the trainmen failed to sound the crossing whistle; that they failed to warn plaintiff's intestates, or slacken the speed of the train after they knew, or could have known, of their peril. Defendant's answer is in effect a general denial and a plea of contributory negligence.

At the place where the accident occurred, defendant's railway track runs east and west, while Highway No. 40 runs in the same direction, but to the south of and parallel with the railway track for some considerable distance. St. Marys College is located north of the railway tracks, the grounds of which are entered from Highway No. 40 by means of a road leading north from the main highway and crossing the railway track. The distance from the north edge of the highway to the south rail of the track is 71½ feet. This railway crossing was marked by the standard railway crossing sign, located seventeen feet south of the south rail, at the east edge of the highway as it passed north at right angles from Highway No. 40. The contour of the ground is generally level, so that an occupant of an automobile turning north from the main highway toward the railway crossing onto the highway leading toward the entrance of the college grounds, has an unobstructed view of a railroad train approaching from the east for a distance of more than 2,000 feet.

The Andlauers were traveling west on Highway No. 40, in a closed automobile, intending to drive into St. Marys College grounds, their son being a student at the college. After turning north, leaving Highway No. 40, and as they passed onto the railway crossing, they were struck by a west-bound passenger train and almost instantly killed.

The accident occurred about 3:30 in the afternoon, on a clear day. Andlauer and his wife were both familiar with the crossing. As they turned north, approaching the crossing, they were travelling at a speed estimated at from twelve to fifteen miles an hour, and did not slacken nor increase that speed, so far as the record shows. There was evidence that the train was travelling from fifty to sixty miles an hour, and there was testimony of two witnesses to the effect that they did not hear the crossing whistle sounded. There was also evidence that the train

[fol. 65] was about an hour late, and that it usually slowed down to from twenty-five to thirty miles an hour in passing by the St. Marys College property.

St. Marys is a town of about 1,200 inhabitants, and there is a student body at the college of from 500 to 1,000 students, and a faculty of about 100, all of whom, we assume, lived on the campus in dormitories, although that is not very clear from the record. An ordinance of the City of St. Marys limits the speed of trains within the city limits to twenty miles an hour, fixing as a penalty for the violation of the ordinance a fine of not less than $25.00, nor more than $100.00.

When the plaintiff rested, defendant interposed a motion for a directed verdict, moving in the alternative for a directed verdict or a dismissal upon the merits. The court granted defendant's motion in the alternative, and dismissed the petition on its merits. To this action of the court plaintiff excepted "for the reason that under the pleadings and the evidence the plaintiff was entitled to recover and was entitled to have the cause submitted to the jury." The exception was allowed, and the case has been removed to this court by appeal.

In effect the negligence charged is (1) failure to sound any warning of the approach of the train, either by the ringing of a bell or the sounding of a whistle, after knowledge that the automobile in which the Andlauers were riding was approaching a position of peril; (2) failure to observe a custom theretofore observed by it, to slow down its trains when passing St. Marys College and entering the city limits of St. Marys; and (3) failure to ring any bell or sound any whistle within eighty rods of the crossing. It is the contention of plaintiff that he was entitled to go to the jury on each of these issues.

Defendant contends that (1) the evidence was insufficient to raise an issue as to the allegations of primary negligence; (2) that plaintiff's intestates were guilty of such contributory negligence as precludes recovery; and (3) that the doctrine of discovered peril or last clear chance was not applicable because there was no evidence that the defendant's employees discovered the peril in time to have avoided the accident.

[fol. 66] In our view of the case it is not necessary to consider the debated question as to whether there was sufficient

evidence of primary negligence to entitle plaintiff to have that issue submitted to the jury, because it seems clear, under the undisputed evidence, that Mr. and Mrs. Andlauer were both guilty of contributory negligence. We, therefore, assume, without deciding, that the evidence on the question of primary negligence was such as to entitle plaintiff to have had that issue submitted to the jury. As has been observed, the accident occurred in broad daylight, on a clear afternoon. The view toward the east was unobstructed, and had either of the occupants of the car looked toward the east as they approached this crossing, he could not but have seen the approaching train. It appears that the car in which the Andlauers were riding, was travelling at a speed of from ten to twelve miles an hour from the time it left the main highway and approached the crossing, and during that time the speed neither decreased nor increased; the car neither stopped nor turned aside. These are undisputed physical facts. It was their duty to look and listen as they approached this crossing, at such time and place as looking and listening would be effective. This crossing was a point of danger, with which they were both familiar. Certainly, the contributory negligence of the driver cannot be denied.

It is argued, however, that the negligence of the driver should not be imputed to Mrs. Andlauer, as she was a mere passenger or guest. We need not determine whether, under the facts and circumstances disclosed by this record, the negligence of Mr. Andlauer should be imputed to his wife, because this court has consistently held to the rule that it is the duty of one riding in an automobile, even though he is not the driver, to keep a lookout at railway crossings and give warning to the driver. Bradley v. Missouri Pacific R. Co., (C. C. A. 8) 238 Fed. 484; Noble v. Chicago, M. & St. P. Ry. Co., (C. C. A. 8) 298 Fed. 381; Chicago & E. I. Ry. Co. v. Sellars, (C. C. A. 8) 5 Fed. (2d) 31; Kutchma v. Atchison, T. & E. F. Ry. Co., (C. C. A. 8) 23 Fed. (2d) 183; Parramore v. Denver & R. G. W. R. Co., (C. C. A. 8), 5 Fed. (2d) 912. See also: Summers v. Denver Tramway Corp., (C. C. A. 10) 43 Fed. (2d) 286; Garrett v. Pennsylvania R. Co., (C. C. A. 7) 47 Fed. (2d) 10.

In Bradley v. Missouri Pacific R. Co., supra, the facts were very similar to those in the instant case. In that case [fol. 67] Mr. Bradley was riding in an automobile driven

by a Mr. Brown. At a point forty feet east of the railway crossing the approaching train was visible for a distance of 800 feet. Both occupants of the car were killed, and there was no direct testimony as to the care exercised either by the driver or by Mr. Bradley. Both, as in the case at bar, were familiar with the crossing. This court held that Bradley, even though merely a guest, was conclusively shown by the record to have been guilty of contributory negligence. In the course of the opinion by Judge Kenyon it is said:

"Here the hazard was brought about as much by Bradley's negligence as by Brown's. We think the question of contributory negligence here was one of law for the court, as the evidence relating thereto was undisputed, and but one conclusion can be drawn therefrom by reasonable minds, and that is that Bradley was guilty of contributory negligence, and the court would have been justified in so holding as a matter of law."

The doctrine of the Bradley case was reaffirmed by this court in Noble v. *Chicago, M. & St. P. Ry. Co.*, supra. In that case, which involved the question of contributory negligence of a passenger, it is said:

"The negligence of the driver of a car is not always, or necessarily, imputable to the passenger; but, outside the conduct of her husband, we think, on this record, that the plaintiff was equally guilty of contributory negligence. Admittedly she had a better opportunity than her husband to observe the train and in sufficient time to warn him. This she did not do, and is therefore guilty of contributory negligence as a matter of law."

Referring again to the facts in the instant case, it is observed that when the car turned north, approaching the crossing, it was 71½ feet from the south rail. Mrs. Andlauer was on the right side, in the front seat, and, as in the Noble case, had a better opportunity of observing the approaching train than her husband, who was at the wheel. But it is argued that in the absence of evidence, we must presume that she was in the exercise of reasonable care. If so, we should presume that she looked, and, of course, if she looked, she must have discovered the approaching train. If we may pursue the line of presumption further,

[fol. 68] in violation of the rule that one presumption cannot be based upon another presumption, we should presume that she warned her husband. Then there is a presumption that he exercised ordinary care. There are two answers to the argument based upon presumption. First, one presumption cannot be based upon another presumption. Brady v. United States, (C. C. A. 8) 24 Fed. (2d) 399; General Reinsurance Corp. v. Southern Surety Co., (C. C. A. 8) 27 Fed. (2d) 265; Lincoln National Life Ins. Co. v. Erickson, (C. C. A. 8) 42 Fed. (2d) 997. Second, a presumption cannot be weighed as against evidence, and does not constitute affirmative proof. In the absence of evidence, a presumption of fact may prevail. It takes the place of evidence; but when there is evidence on an issue, presumption as to that issue disappears. United States v. LeDuc, (C. C. A. 8) 48 Fed. (2d) 789; Guaranty Trust Co. v. Minneapolis & St. L. R. Co., (C. C. A. 8) 36 Fed. (2d) 747; Fidelity & Casualty Co. v. Niemann, (C. C. A. 8) 47 Fed. (2d) 1056.

Here, the physical facts and surrounding circumstances, all practically undisputed, would seem conclusively to show that the occupants of this car, heedlessly, and without looking or listening, drove onto this crossing without any knowledge of the approach of the train. They knew that they were approaching the crossing; they knew exactly where they were and where the crossing was. They had an unobstructed view of the approaching train, yet the car neither stopped, slackened its speed, increased its speed, nor turned to the right nor to the left, but went steadily forward. These physical facts and surrounding circumstances overcome all presumption as to the exercise of ordinary care, and conclusively establish that both the occupants of this car were guilty of contributory negligence, unless, as contended by appellant, the doctrine of discovered peril can be invoked.

It is argued that the defendant's employees in charge of the train, in the exercise of ordinary care, should have discovered the peril of plaintiff's intestates in time to have averted the accident. There are at least two answers to this contention. First, the evidence is not such as to charge the employees in charge of the train, with knowledge that the Andlauers were intending to drive onto this crossing. Certainly, until the car turned north toward the crossing, the employees were not charged with knowledge of their

[fol. 69] presence. They were warranted in assuming that these people would exercise ordinary care, that they knew they were approaching a crossing, and that the train was approaching a crossing. With this knowledge, they may well have assumed that the automobile would be stopped before it passed onto the crossing. If employees of the Railroad Company could not so assume, then it would be necessary to stop the train at every highway crossing, wherever situate, or to approach it at such a speed as to be able to stop the train whenever the train crew observed anyone approaching a crossing. If this train were going at as high a rate of speed as contended, it certainly could not have been stopped within several hundred feet; whereas, the automobile, travelling at a speed of from twelve to fifteen miles an hour, could have been stopped almost instantly. Second, the doctrine of discovered peril or last clear chance is not applicable because there is no proof that the employees operating the train had knowledge of the peril. This court has consistently held that such knowledge must be actual. It is bottomed on the theory that after the actual discovery of a person in peril, there is time within which, by the exercise of ordinary care, to avoid the injury. In the instant case, there is no evidence that the employees actually discovered decedents' peril. Certainly, there is no evidence that they discovered such peril in time to have avoided the accident. Marshall v. Hines, (C. C. A. 8) 271 Fed. 165; Miller v. Canadian Northern Ry. Co., (C. C. A. 8) 281 Fed. 664; Wheelock v. Clay, (C. C. A. 8) 13 Fed. (2d) 972; Walker v. East St. Louis & S. Ry. Co., (C. C. A. 8) 25 Fed. (2d) 579; Kinney v. Chicago Great Western R. Co., (C. C. A. 8) 17 Fed. (2d) 708.

In Marshall v. Hines, supra, this court said:

"The plaintiff's definition of the last clear chance doctrine is too broad and erroneous. The exception it presents is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. It does not include cases where, by the exercise of ordinary care, the plaintiff might have made such a discovery in time to avoid the injury."

In the instant case, the Railroad Company produced no testimony and there was no evidence that the engineer or

fireman, or any other employees in charge of the train, discovered the Andlauers or their peril before they were in- [fol. 70] jured, and hence, the exception to the rule of contributory negligence cannot be invoked.

It is finally urged that the court erred in granting the alternative motion to dismiss the case, instead of directing a verdict. When defendant's motion was submitted, no objection was made to its form, and in the exception taken by plaintiff to the action of the court granting the motion, no complaint was made that the procedure invoked was objectionable. Had such an objection or exception been taken at the time, the procedure could readily have been cured. The objection is purely technical and could not possibly have prejudiced the plaintiff. What is said by this court in Bowman v. Atchison, T. & S. F. Ry. Co. (C. C. A. 8) 184 Fed. 697, is here apposite. It is there said:

"The court sustained the motion for a directed verdict and added: 'Enter judgment for the defendant as on the verdict of the jury.' No verdict of the jury appears in the record, and the fair inference is the court dispensed with one. The plaintiff excepted generally to the ruling and the final judgment, but the court was not informed that complaint was made because a verdict was not taken in conformity with the ruling of the motion. And, though it is made the subject of assignments of error, they are not relied on in the brief. Our attention is, however, directed to the practice. We agree with counsel that the practice is objectionable. A serious question would have been presented had the trial court been distinctly advised that exception was taken to it and an opportunity given to correct it."

In a later case, Wear v. Imperial Window Glass Co., (C. C. A. 8) 224 Fed. 60, in an opinion by the late Judge Sanborn, it is said:

"There is another reason why no reviewable question of law is presented to this court in this case. A trial court is entitled to a clear specification by exception of any ruling or rulings which a party challenges and desires to review, to the end that the trial court itself may correct them if so advised, and, if it fails to do so, that there may be a clear record of the rulings and the challenges thereof. For this

purpose a rule has been firmly established that an exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling."

[fol. 71] If there was even a technical error, it was waived, and cannot be considered by this court. See, also: United States v. United States Fidelity & Guaranty Co., 236 U. S. 512; Fillippon v. Albion Vein Slate Co., 250 U. S. 76. The rule is a just one and affords an opportunity, both to the trial court and opposing counsel, to correct the error, which in the instant case goes only to matters of form; and it enables the appellate court to determine what questions were actually presented to the lower court.

We conclude that the court correctly directed a verdict for the defendant on the ground of contributory negligence, and the judgment appealed from is affirmed.

[File endorsement omitted.]

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT

No. 9554

WILLIAM MILLER, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, Deceased, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a Corporation

JUDGMENT—February 20, 1933

Appeal from the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Dis-

trict Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Union Pacific Railroad Company, a Corporation, have and recover against William Miller, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, deceased, the sum of Twenty Dollars for its costs herein and have execution therefor.

[fols. 73-85] Petition for rehearing, covering 13 pages, filed March 21, 1933, omitted from this print. It was denied, and nothing more by Order of March 24, 1933.

[fol. 86] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—March 24, 1933

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

In United States Circuit Court of Appeals

Motion to Stay Mandate—Filed April 1, 1933

Appellant respectfully states that his counsel are engaged in the preparation of an application for a writ of certiorari to present as soon as the same is ready to the Supreme Court of the United States to review the record in the above entitled cause and for said reason the said appellant respectfully prays this Honorable Court to order that the mandate herein be stayed pending the disposition of said application for certiorari in said cause.

William Buchholz and Martin J. O'Donnell, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—April 4, 1933

On consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 88] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 89] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,643. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 51. William Miller, administrator of the estates of Marcus Andlauer and Ellanore Andlauer, petitioner, vs. Union Pacific Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed May 8, 1933. File No. 51, O. T., 1933.